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Supreme Court, U.S.

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No. _____

**In The
Supreme Court Of The United States**

OCTOBER TERM, 1988

**KAREN PINEMAN, ALPHONSE MAROTTA,
DANIEL CLIFFORD, JUDITH NARUS,
ROSE SCHEWE and ALFRED K. TYLL,**
Petitioners,

v.

**WILLIAM J. FALLON, Chairman of the
State Employees Retirement Commission,
HENRY E. PARKER, Treasurer of the
State of Connecticut, and
J. EDWARD CALDWELL, Comptroller of the
State of Connecticut,**
Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Did the Connecticut State Employees Retirement Act (SERA) and post-enactment conduct by the State create contractual obligations under the Contract Clause obliging Connecticut to maintain pre-1975 minimum retirement ages for unretired state employees who were employed prior to the 1975 amendment which raised the minimum retirement age by five years?

2. Were the petitioners' property rights in their pensions taken without just compensation in violation of the Due Process Clause of the Fifth and Fourteenth Amendments by amendments to SERA which retroactively raised the minimum retirement ages for unretired state employees?

3. Did the courts below apply an inappropriate standard of review to petitioners' due process claims?

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The petitioners, Karen Pineman, Alphonse Marotta, Daniel Clifford, Judith Narus, Rose Schewe and Alfred K. Tyll, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 10, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. Prior pertinent opinions in chronological order are reported under the name of *Pineman v. Oechslin*, 494 F. Supp. 525 (D. Conn. 1980); 637 F.2d 601 (2d Cir. 1981); 195 Conn. 405, 488 A.2d 803 (1985); and *Pine-man v. Fallon*, 662 F. Supp. 1311 (D. Conn. 1987) and are included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 10, 1988, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No State shall . . . pass any . . . law impair-
ing the obligation of contracts . . . U.S. CONST.
Art. I. § 10 c. 1.

. . . nor shall private property be taken for pub-
lic use, without just compensation. U.S. CONST.
AMEND V.

No State shall . . . deprive any person of life,
liberty, or property, without due process of law . . .
U.S. CONST. AMEND XIV.

The Connecticut State Employees Retirement Act, Conn.
Gen. Stat. § 5-152 *et seq.* (SERA) is with the 1975 revisions
(1975 Act) set forth in pertinent aspects in the Appendix.

STATEMENT OF THE CASE

From its passage in 1939 until 1974, the Connecticut State Employees Retirement Act, Conn. Gen. Stat. § 5-152 *et seq.* (SERA), provided that an employee's eligibility for pension benefits varied according to gender: women with 25 years of service were eligible for retirement with full benefits at age 50, while men with the same length of service became eligible at age 55. Conn. Gen. Stat. § 5-162(c)(1) (amended 1975). For employees with 10 to 25 years of service, the eligibility age for retirement with full benefits was 55 for women and 60 for men. Conn. Gen. Stat. § 5-162(d)(1) (amended 1975). Similar five-year eligibility differences, based on gender, existed for reduced pension benefits, which were available under certain circumstances, Conn. Gen. Stat. §§ 5-163(c) and 5-166(a) (amended 1975), and the tables by which benefits were calculated ensured that a female retiree received benefits equal to those received by a male retiree five years her senior. Conn. Gen. Stat. § 5-162(d)(3) (amended 1975).

State employees, with few exceptions, were required to participate in and contribute to the system. Conn. Gen. Stat. § 5-160. Employees with less than ten years of service could withdraw their contributions to the plan upon leaving state employment. Conn. Gen. Stat. § 5-166. Employees with more than ten years of service had "vested" rights in the retirement plan which they did not lose even if they terminated their employment with the state. Conn. Gen. Stat. § 5-166.

In 1974, the United States District Court for the District of Connecticut found that the five-year retirement age differentials between male and female employees discriminated against men in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e. *Fitzpatrick v. Bitzer*, 390 F. Supp. 278 (D. Conn. 1974); *aff'd in part and rev'd in part on other grounds*, 519 F.2d 559 (2d Cir. 1975); *aff'd in part and rev'd in part on other grounds*, 427 U.S. 445 (1976). Connecticut did not appeal the *Fitzpatrick* ruling and began to administer its retirement plan in conformity with the court's decision so that

men were able to retire at the lower ages previously applicable only to women. *Pineman v. Oeschlin*, 494 F. Supp. 525, 530-531 (D. Conn. 1980). In 1975, at the next legislative session, the State legislature amended the retirement statute, by raising the retirement eligibility ages for female employees by five years so that they equaled the higher retirement ages which had been in effect for male employees prior to *Fitzpatrick*. P.A. No. 75-531 (1975) ("1975 Act"). A small number of employees who were close to retirement were permitted to retire pursuant to the terms of the prior act. P.A. No. 75-531 § 5.

The petitioners, who represent various classes of state employees, brought this action challenging the constitutionality of the 1975 Act claiming that it violates the Contract Clause by impairing Connecticut's contractual obligations to provide them with benefits at the retirement ages previously established. In addition, petitioners claimed that the 1975 Act effected a taking of their property rights without just compensation and without due process of law.

The facts relating to the retirement system were not in dispute and petitioners moved for summary judgment on the Contract Clause issue. The District Court, Jose A. Cabranes, J., granted the petitioners' motion for summary judgment, holding that the 1975 Act, as applied to the petitioners, violated the Contract Clause. *Pineman v. Oeschlin*, 494 F. Supp. 525 (D. Conn. 1980) ("*Pineman I*"). In a lengthy and careful opinion, Judge Cabranes conformed to the analysis in recent contract clause cases such as *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). He gave consideration and weight to relevant state law, under *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), and, while recognizing that he was not bound by Connecticut's law of contracts, found that under the state's common law, Connecticut had contractual obligations to its employees.

The respondents appealed the decision to the United States Court of Appeals for the Second Circuit, which concluded that the federal courts should abstain from deciding whether SERA was part of the state employees' contract of employment in the absence of any state court decisions addressing this issue, and therefore vacated the judgment and remanded the suit. *Pineman v. Oechslin*, 637 F.2d 601 (2d Cir. 1981) ("*Pineman II*"). Following the procedure established in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), the Court of Appeals directed that the district court retain jurisdiction pending the state court determination of the state law question.

The petitioners filed a complaint in Connecticut Superior Court on August 25, 1981, and, invoking the *England* doctrine, reserved their right to return to the District Court. On May 4, 1984, the Superior Court ruled that no contractual obligation was created by SERA. That decision was affirmed by the Connecticut Supreme Court in a ruling on March 12, 1985. *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803 (1985) ("*Pineman III*"). The court ruled that in the absence of an express statement by the legislature "in clear and unambiguous terms" that it was creating a contract, no contractual rights could be found to exist. *Id.* at 415. The court said that the petitioners had property interests, but declined to rule on the due process issue.

The petitioners returned to the District Court and after preliminary rulings (including "*Pineman IV*" not in issue), the parties filed cross motions for summary judgment. The petitioners here summarize uncontroverted material which was set forth at much more length in the joint appendix in the court below.

Retirement benefits have generally been brought to the attention of state employees by the state around the time of hiring. This has been accomplished orally and by means of written material and pamphlets. A 37-page blue pamphlet dated January 1972 was printed in large quantity and ordered

distributed to employees at the time of hiring. The booklet stated, "You may retire — and receive immediate retirement benefits — at any time after you reach the minimum permissible retirement age . . . 50 for women . . ." (Ex. C-1 contained in the Joint Appendix to the Second Circuit at 170a). Many prospective employees inquired about the retirement system and its benefits. Some employees changed from other more lucrative employment due to superior state retirement benefits. The retirement benefits provided prior to the 1975 amendments, including the minimum retirement ages, were substantial factors in an employee's planning and provisions for his or her future and that of his or her spouse. The retirement system was a substantial inducement to persons to enter and to remain in state employment. For several years prior to the *Fitzpatrick* decision in 1974, an indeterminate number of male employees believed they would obtain, through legislative or judicial action, equal treatment with women under the retirement laws. From the date of that decision to June 1975, prospective and existing male employees were informed by the state, or learned, that their retirement ages and benefits had become the same as those of women. (Revised Request for Admissions contained in the Joint Appendix to the Second Circuit at 139a. See also the 1961 pamphlet, contained in the Joint Appendix to the Second Circuit at 179a).

In 1971, SERA was amended to provide for the sound funding of the retirement system on an actuarial reserve basis. Conn. Gen. Stat. § 5-156(a). The State's actuary indicated that this legislative mandate was being carried out as of December, 1975 (Ex. 39).

The 1975 Act contained no "compensating" benefits to existing employees for the major detrimental modifications it made. It was not preceded by any legislative finding that the retirement fund or the state treasury was fiscally unsound, nor did the defendants produce any evidence indicating such fiscal jeopardy. Estimated initial annual cost savings of 3 to 5 million dollars were miniscule portions of the state budget. Moreover, it was clear that this reduction was not necessitated

by a fiscal crisis or other specified need for the sums, as the remarks in the legislature indicate that "this House will be able to find a place to use [these funds]." (Joint Appendix to the Second Circuit at 8a, 30a).

On these facts, Judge Cabranes granted respondent's cross-motion for summary judgment, accepting the state court's opinion that SERA did not create any contract rights and also ruling that the 1975 Act did not deny the petitioners due process because their property interests were modified by the legislature for the reason of "fiscal relief" (a claim which he had rejected in *Pineman I* as insufficient under a Contract Clause analysis). *Pineman v. Fallon*, 662 F. Supp. 1311 (D. Conn. 1987) ("*Pineman V*"). The United States Court of Appeals for the Second Circuit affirmed ("*Pineman VI*").

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS HAS MISAPPLIED THE DECISIONS OF THIS COURT.

(a) An Express Limitation On The Right To Repeal Legislation Is Not Required In Order To Find That A State Has Entered Into A Contract.

In holding that summary judgment for respondents was appropriate, the Second Circuit gave undue deference to the Connecticut Supreme Court's ruling that SERA created no contractual obligations. The Connecticut Supreme Court erroneously held that a state could never be found to have created an implied contract, ruling that government-fostered expectations do not result in a contractual obligation unless the legislature, in clear and unambiguous terms, expressly surrendered its power of amendment and revision. *Pineman III*, *supra*, 195 Conn. at 415-416.

Thus, both the Connecticut Supreme Court and the Second Circuit ignored the undisputed facts that the minimum retirement ages had remained unchanged since the inception of the Act in 1939 and that Connecticut had induced persons to seek and remain in state employment by advertising the state's retirement benefits. Petitioners have substantially performed their end of the bargain in reliance upon beliefs fostered by the state. To permit the state to now repudiate its representations "would perpetrate a considerable injustice." *United States v. Larionoff*, 431 U.S. 864, 876 n. 19 (1977).

In *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), this Court observed that:

a legislative enactment may contain provisions which, when accepted as the basis of action by individuals, become contracts between them and the State or its subdivisions with the protection of Article I § 10. . . . On such a question, one primarily of state law . . . we are bound to decide for ourselves whether a contract was made.

Accordingly, this Court rejected the opinion of the Indiana Supreme Court that Indiana had not created contractual obligations relating to teacher tenure decisions. *Id.*

In addition, legislation affecting the obligation of the state is subject to stricter scrutiny under the Contract Clause than laws merely affecting contracts between private parties. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 n. 15 (1978).

Petitioners, and *Pineman I*, relied heavily on the language and analysis giving meaning to the Contract Clause in *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). *Allied* at 438 U.S. 241, 250 spoke against major, unforeseen and retroactive changes in pension funding, without moderation or

reason, in the spirit of oppression — much as here the legislative history of the 1975 Act demonstrates. (Joint Appendix to the Second Circuit at 8a, *Pineman I*). In *Fisk v. Police Jury of Jefferson*, 116 U.S. 131 (1885), this court recognized that contract clause protection must extend to implied contracts, particularly when action has been taken or substantial services have already been performed. See also, *United States v. Larionoff*, *supra*, 431 U.S. at 879.

The federal courts below acted in conflict with these precedents and gave undue deference to the state court opinion in *Pineman III*. The state court rejected petitioners' contract claims, but the contract approach does not "play havoc" with basic principles of contract law, let alone "traditional contract clause analysis." *Pineman III* also stretched mutual assent to cover modifications of *all* contractual relationships including unilateral and promissory estoppel ones, and disregarded a state's reserved powers which are a major underpinning ("necessary and reasonable") of the *United States Trust* analysis. Indeed, "reasonable modification" comports with heightened judicial scrutiny — yet here the actual modification was major, retroactive, unreasonable and unnecessary. *Pineman III* strays further from soundness in making a major distinction between public and private employment, equating that with express legislative intent, and forgetting that the contract clause applies to state legislation, not federal.

Moreover, since *Pineman III*, the Connecticut Supreme Court confirmed that an employer's representations, including those in its personnel manual, may, under appropriate circumstances, give rise to an express or implied contract, and that statements in the manual are of critical relevance to the existence of a contract. *Finley v. Aetna Life & Casualty Co.*, 202 Conn. 190, 520 A.2d 207 (1987). This holding should apply to public employees, because when states become employers they "are not acting as sovereignties . . . [but] come down to the level of ordinary individuals [and] [t]heir contracts have the same meaning as that of similar contracts between private persons." *United States Trust Co.*, *supra*, 430 U.S. at 25

n. 23, quoting *Murray v. Charleston*, 96 U.S. 432 (1878). Thus, to the promissory underpinning of SERA would be added the plethora of post-enactment circumstances and representations in this case which would constitute a contract in the private sector and which, at the very least in the public sector, show a relationship *in the nature of a contract*. Here contractual elements abound: offer, acceptance, consideration in pension contributions from wages, consideration in continued service, not to mention reasonable expectations and reliance, all as “reinforced” by oral and handbook representations.

The 1939 SERA contains no reserved power to repeal, alter or amend as to existing employees, which would be inconsistent with a contract (yet still would not be conclusive) as in *National Railroad Passenger Corp. v. Atchinson, Topeka & Santa Fe Railroad Co.*, 470 U.S. 451, 465-67 (1985). This “Amtrak” decision points out the difficulty of finding contracts in schemes of public regulation, but should not be applied to permanent plans of deferred compensation affecting existing employees. Likewise, *United States v. Larionoff*, 431 U.S. 864 (1977) does not apply because it deals with federal employees, and because it actually condemns the taking away of a military enlistment bonus already earned.

Here, to give a specific example, petitioner Pineman, who entered state service in 1955 due in part to specific representations that she could retire with benefits at age 50, worked and contributed a portion of her pay for 20 years until she was “told” of a change by the 1975 Act. She will now have over 35 years of state service before she can retire with benefits at age 55. Unless relief is afforded her, she has to work and contribute for five more years — and if she dies just before reaching 55, she will get nothing back, not even her own contribution from wages.

(b) Petitioners' Property Interests In Their Retirement Funds Have Been Taken Without Compensation.

Petitioners' property interests in retirement funds and benefits have been taken without any compensation in violation of the due process clause of the Fifth Amendment as made applicable to the states by the Fourteenth Amendment. The three-factor analysis reiterated in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1980) should have been applied by the Second Circuit to invalidate the 1975 Act. In *Connolly*, there was no taking because fairness and justice did not require the public "to shoulder the responsibility of rescuing plans that are in financial trouble." Here, starting with the absence of financial trouble, the economic impact is entirely on petitioners due to a partial taking of up to five years or to a complete taking in the case of death during such time; there is a major interference with the receipt of deferred compensation including employees' own contributions, and the government acted hurriedly and without an adjustment of benefits and burdens. The public, not petitioners, should in fairness and justice, bear the additional financial burden imposed on the retirement fund due to a court ruling that discrimination against men existed on the very face of SERA due to the legislature's "fault." Contrary to the Second Circuit, grandfathering was not an adjustment for those not grandfathered; women were suddenly and severely affected by having to work five years longer to receive any pension benefits; there were no increased benefits whatsoever until an employee works and contributes for five years longer, and existing employees had every reasonable expectation that retirement ages would not be reduced.

Although property rights may be taken for a public purpose provided that just compensation is paid, petitioners are still waiting for some compensation — even for their own contributions.

(c) The Legislature Acted Arbitrarily In Retroactively Changing The Minimum Retirement Age.

The petitioners' property interests were impaired by a law, the 1975 Act, which was not rationally related to a legitimate state interest. The *Fitzpatrick* decision had already imposed equality by decreeing that men should receive the same treatment as women under SERA. The 1975 legislature thus did not need to enact equal treatment. Instead, it acted to "equalize upwards" retirement ages. The "fiscal reason" for the 1975 Act was decimated by the analysis in *Pineman I*; but, as later applied for due process purposes, it has been used to make arbitrary legislation virtually unreviewable. The result below is in sharp contrast to the serious fiscal drain as the social security trust fund which justified the exception to the five-year Social Security offset provisions upheld in *Heckler v. Mathews*, 465 U.S. 728 (1984).

The "fiscal reason" for the 1975 Act fails in several major respects: (a) the legislature had already acted in 1971 to fortify its commitment to its employees by mandating a plan of sound long-term financing. Conn. Gen. Stat. § 5-156(a) required future funding on an actuarial reserve basis over a period of time based on certifications, evaluations and appropriations: "The general assembly . . . shall appropriate to the retirement fund the amount . . ." annually certified by the retirement commission to comply with the statute. Progress towards sound financing was underway when *Fitzpatrick* was decided; (b) 1975 legislative history clearly reveals that the initial annual savings to the state were estimated at only three to five million dollars — or by one estimate 2.8 million as to existing employees. There were no claims or findings of imminent fiscal jeopardy to the retirement fund or to the state. Indeed, the remarks of the sponsor of the last-minute retroactive amendment which became part of the 1975 Act — that the "House will be able to find a place to use" those millions — and a Senator — that the state would be able to start realizing immediate savings on appropriations to the fund — demonstrate the absence of any crisis. Indeed

\$3,000,000.00 represents only 3 percent of the \$51,000,000.00 1975 cost of the fund to the State, and is less than $\frac{1}{10}$ th percent of the State's \$1,700,000,000 budget; (c) The predictions of a New York City style bankruptcy were baseless and without any attempt at legislative findings — "in no sense like New York," per *Pineman I*.

Petitioners' characterizations of the 1975 Act which left the Second Circuit "unimpressed" are accurate and accord with *Pineman I*. What is unimpressive is what the Second Circuit presumed the legislature knew. High levels of inflation had not "hit" in 1975 and wages were not yet escalating. The legislature was not reacting to such fiscal considerations anyway, but rather to a federal court (which had remedied reverse sex discrimination) and to employee retirement at age 50 (which had been permitted by the legislature for women for decades). The legislature made no attempt beyond grandfathering to tailor, classify or give any compensatory benefits or adjustments of burdens. The 1975 Act represents the nadir of irrationality and oppression, especially as to long-term employees.

The justification of being able to spend the money elsewhere is reminiscent of Mr. Justice Blackman's observation that a "governmental entity can always find use for extra money," *United States Trust, supra*, 431 U.S. at 26. The Second Circuit, however, has placed the 1975 Act beyond review. If such an Act can be upheld under existing review standards, then it is time to consider a higher standard, at least regarding retirement benefits subjected to major impairment. Heightened scrutiny for state economic legislation is suggested in "*Amtrak*", *supra*, 470 U.S. at 472, footnote 25. Such important and long planned for benefits and systems should not be subject to fast and unfettered legislative whim. Changes in such benefits should be made in a studied, orderly, offsetting compensation manner. *Heckler v. Mathews*, 465 U.S. 728, 748 (1984), observed that "great nations, like great men, should keep their word," and at 751 acknowledged the "important governmental interest of protecting individuals

who planned their retirements in reasonable reliance" on provisions previously in effect.

(d) Importance Of Case And General Incorrectness Of Decision Below.

The class of petitioners in this action has been estimated to consist of up to 25,000 active employees in 1975. Many have had reasonable expectations about retirement dates and benefits shattered. Their morale and retirement planning have been impaired. The state's obvious interests in employees' morale, sound retirement planning and the use of the retirement system to recruit and retain loyal employees vital to the everyday functioning of the government have all been damaged. The vices of retroactive legislation which changes the rules for those already in service, especially those with vested benefits like the petitioners, are manifest.

The situation is likely to recur in those states which, like Connecticut, do not have constitutional or express statutory provisions which protect the retirement benefits of employees from substantial impairment. While a number of states also have case law (cited in *Pineman* I, II, and III) generally following a contractual analysis and balancing adverse changes with compensating benefits, in Connecticut, and potentially in other "unsettled" states, employees in the public sector are now unprotected from unstudied legislative hostility.

Retirement benefits are deferred compensation, a part of the hiring contract. They have been recognized as clearly earned, heavily relied upon, and thought of as property rights — vital to the independence and dignity of the individual. *Winston v. City of New York*, 759 F.2d 242, 247, 250 (2d Cir. 1985), quoting Reich, *The New Property*, 73 Yale L.J. 733, 769 (1964) after quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) on the creation of property interests. Now, in Connecticut, contract-type rights which would be protected for employees in the private sector, are not recognized under the

Contract Clause as obligations of the State itself. Moreover, public employees' property rights are subject to deprivation under the Due Process Clause, without legislative finding or real reason. The hint of fiscal crisis or unsoundness can now immunize any act a legislature may choose to pass — including a sweeping command to long-term employees to make additional contributions and to work five years longer before they can retire. And their property or contractually-based rights can be taken by the state without any "offsetting" compensation — even that portion of their benefits consisting of their own contributions — contributions which would be returned to them under SERA if they left state service with less than ten years of service.

In sum, in Connecticut and potentially in any state where the *Pineman* decisions could be applied, state employees cannot count on retirement benefits unimpaired by the legislature until they are eligible to retire, irrespective of representations and other inducements. That is wrong, and the constitutional issues and misapplication of precedents need settling by this Court.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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Substitute House Bill No. 5176

PUBLIC ACT No. 75-531

AN ACT CONCERNING ELIGIBILITY FOR STATE
RETIREMENT.

Section 1. Subsection (c) of
section 5-162 of the general statutes
is repealed and the following is
substituted in lieu thereof:

(c) Schedule 1--Twenty-five or
more years of state service.

(1) EXCEPT AS PROVIDED IN SECTION
5 OF THIS ACT, [Each] EACH member who
has completed twenty-five or more years
of state service shall be retired, on
his own application or on the
application of the executive head of
the agency employing him, on the first
day of the month named in the
application, and on or after the
member's fifty-fifth birthday [, if a

man, or fiftieth birthday, if a woman.]

(2) Each member who has completed twenty-five or more years of state service and has reached his seventieth birthday and who is in an appointive position shall continue in service and shall be retired on the first day of the month on or after his seventieth birthday, upon notice from the retirement commission to the member, to the executive head of his agency and the comptroller.

(3) Each member referred to in subdivisions (1) and (2) of this subsection shall receive a monthly retirement income beginning on his retirement date equal to one-twelfth of (A) plus (B): (A) Twenty-five per cent of his social security earnings, plus fifty percent of his excess earnings; (B) the number of years, if any, taken to completed months, of his state

service in excess of twenty-five years multiplied by one percent of his social security earnings, plus the number of such years multiplied by two per cent of his excess earnings.

Sec. 2. Subsection (d) of section 5-162 of the general statutes is repealed and the following is substituted in lieu thereof:

(d) Schedule 2--Less than twenty-five years of state service.

(1) EXCEPT AS PROVIDED IN SECTION 5 OF THIS ACT, [Each] EACH member who has completed less than twenty-five years of state service shall be retired on his own application, the first day of the month following his application, if [he then meets any one of the following conditions: (A) The member is a woman who has completed five years of state service and reached her sixty-fifth birthday; (B) the member is

a woman who has completed ten years of state service and reached her fifty-fifth birthday; (C)] the member [is a man who] has completed ten years of state service and reached his sixtieth birthday.

(2) Each such member in an appointive position who has reached his seventieth birthday shall continue in service and shall be retired on the first day of the month on or after his seventieth birthday, upon notice from the retirement commission to the member, the executive head of his agency and the comptroller.

(3) Each member referred to in subdivisions (1) and (2) of this subsection shall receive a monthly retirement income beginning on his retirement date equal to one-twelfth of (A) plus (B): (A) The number of years of his state service, taken to

completed months, multiplied by the applicable percentage of his social security earnings determined from the table below for the appropriate age and years of state service; (B) the number of such years multiplied by the applicable percentage of his excess earnings determined from the table below for such age and years of service.

[Age of Member on His Retirement Date		Years of State Service	Percentage of Social Security Earnings	Excess Earnings
Man	Woman			
70 and over	85 and over	5 and over*	1.25%	2.50%
65 to 70	60 to 65	10	1.00	2.00
64	59	10	.94	1.88
63	58	10	.88	1.76
62	57	10	.82	1.64
61	56	10	.76	1.52
60	55	10	.70	1.40
59	54	10	.65	1.30
58	53	10	.60	1.20
57	52	10	.56	1.12
56	51	10	.53	1.06
55	50	10	.50	1.00

*Not more than 20 years may be counted for this age and percentage group.]

AGE OF MEMBER ON HIS RETIRE- MENT DATE	YEARS OF STATE SERVICE	PERCENTAGE OF SOCIAL SECURITY EARNINGS	EXCESS EARNINGS
<u>70 AND OVER</u>	<u>5 AND OVER*</u>	<u>1.25%</u>	<u>2.50%</u>
<u>65 - 70</u>	<u>10</u>	<u>1.00</u>	<u>2.00</u>
<u>64</u>	<u>10</u>	<u>.94</u>	<u>1.88</u>
<u>63</u>	<u>10</u>	<u>.88</u>	<u>1.76</u>
<u>62</u>	<u>10</u>	<u>.82</u>	<u>1.64</u>
<u>61</u>	<u>10</u>	<u>.76</u>	<u>1.52</u>
<u>60</u>	<u>10</u>	<u>.70</u>	<u>1.40</u>
<u>59</u>	<u>10</u>	<u>.65</u>	<u>1.30</u>
<u>58</u>	<u>10</u>	<u>.60</u>	<u>1.20</u>
<u>57</u>	<u>10</u>	<u>.56</u>	<u>1.12</u>
<u>56</u>	<u>10</u>	<u>.53</u>	<u>1.06</u>
<u>55</u>	<u>10</u>	<u>.50</u>	<u>1.00</u>

*NOT MORE THAN 20 YEARS MAY BE COUNTED FOR THIS AGE AND PERCENTAGE GROUP.

For each full year of service beyond ten, the percentage of social security earnings shall be increased by one-fifteenth of the difference between one and the percentage shown in the above table opposite the age of the retiring employee, and the percentage of excess earnings shall be increased by one-fifteenth of the difference between two and the percentage shown in the above table opposite the age of the retiring employee.

Sec. 3. Subsection (c) of section 5-163 of the general statutes is repealed and the following is substituted in lieu thereof:

(c) EXCEPT AS PROVIDED IN SECTION 5 OF THIS ACT, [A] A member whose state service is terminated because of economy lack of work or abolition of his position, or who, being an army or air national guard technician in the military department, is dismissed by reason of separation from the national guard because of age, after he has completed twenty-five years of state service but before he has reached his fifty-fifth birthday, [if a man, or her fiftieth birthday, if a woman,] shall be entitled to a retirement income. The amount of each monthly payment shall be determined from subsection (c) of section 5-162, if the member elects the first day of the month on or after

such birthday as his retirement date; and shall be the actuarial equivalent of such amount, as determined by the retirement commission, if the member elects the first day of the month on or after his termination date as his retirement date.

Sec. 4. Subsection (a) of Section 5-166 of the general statutes is repealed and the following is substituted in lieu thereof:

(a) EXCEPT AS PROVIDED IN SECTION 5 OF THIS ACT, [A] A member who leaves state service before he is eligible for retirement but after completing at least ten years of state service, of which at least five years shall have immediately preceded the date of his leaving state service, shall continue to be a member, and shall be eligible for a retirement income as provided in section 5-162, but on a reduced

actuarial basis, as determined by the retirement commission [provided, if such member is a woman she shall be eligible upon reaching her fiftieth birthday and if a man, he shall be eligible] upon reaching his fifty-fifth birthday. Such vested retirement income shall not be subject to divestiture by subsequent employment unless the member withdraws his retirement contribution.

Sec. 5 (NEW) (a) Any member who has completed twenty-five years of state service and has reached the age of fifty prior to June 30, 1980, may elect to be retired on the first day of the month following such application and receive retirement benefits in accordance with the provisions of subdivision (3) of subsection (c) of section 5-162 of the general statutes,

provided such member so elects prior to June 30, 1980.

(b) Any member who has completed at least ten but less than twenty-five years of state service and reached the age of fifty-five prior to June 30, 1980, may elect to be retired on the first day of the month following his application and receive retirement benefits in accordance with subsection (d) of this section, provided such member so elects prior to June 30, 1980.

(c) Any member who has completed at least five but less than ten years of state service and has reached the age of sixty-five prior to June 30, 1980, may elect to be retired on the first day of the month following such application and receive retirement benefits in accordance with the provisions of subsection (d) of this

section, provided such member so elects prior to June 30, 1980.

(d) Each member referred to in subsections (b) and (c) of this section shall receive a monthly retirement income beginning on his retirement date equal to one twelfth of (A) plus (B):

(A) The number of years of state service taken to completed months, multiplied by the applicable percentage of his social security earnings determined from the table below for the appropriate age and years of state service; (B) the number of years multiplied by the applicable percentage of his excess earnings determined from the table below for such age and years of service.

Age of Member on his Retirement Date	Years of State Service	Percentage Of Social Security Earnings	Excess Earnings
65 and over	5 and over*	1.25%	2.50%
60 to 65	10	1.00	2.00
59	10	.94	1.88
58	10	.88	1.76
57	10	.82	1.64
56	10	.76	1.52
55	10	.70	1.40
54	10	.65	1.30
53	10	.60	1.20
52	10	.56	1.12
51	10	.53	1.06
50	10	.50	1.00

*Not more than 20 years may be counted for this age and percentage group.

For each full year of service beyond ten, the percentage of social security earnings shall be increased by one-fifteenth of the difference between one and the percentage shown in the above table opposite the age of the retiring employee, and the percentage of excess earnings shall be increased by one-fifteenth of the difference between two and the percentage shown in the above table opposite the age of the retiring employee.

Sec. 6. This act shall take
effect from its passage.

Approved June 30, 1975

8471H

Funding of retirement system on
actuarial reserve basis

(a) The state employees' retirement system shall be funded on an actuarial reserve basis. The retirement commission shall, on or before December first, annually certify to the general assembly the amount necessary on the basis of an actuarial determination to gradually establish and subsequently maintain the retirement fund on such determined actuarial reserve basis, and make such other recommendations with regard to such fund and its administration as the commission deems appropriate. The retirement commission shall, at least once every three years, prepare a valuation of the assets and liabilities

of the system. On the basis of each such valuation, it shall redetermine the normal rate of contribution and, until it is amortized, the unfunded past service liability. The general assembly shall review the commission's recommendations and certification and shall appropriate to the retirement fund the amount certified by the retirement commission as necessary provided said certification is in compliance with this section.

(b) The retirement commission shall determine on an actuarial basis (1) a normal rate of contribution which the state shall be required to make into the retirement fund in order to meet the actuarial cost of current service and (2) the unfunded past service liability. For the first fifteen years, the funding program for

the actuarial reserve basis shall consist of the following percentages of the sum of normal cost and the amount required for a forty-year amortization of unfunded liabilities:

Fiscal year Beginning of	Percentage to be paid of normal cost plus full 40-year amortization from the beginning of such fiscal year
7-1-71	30
7-1-72	35
7-1-73	40
7-1-74	45
7-1-75	45
7-1-76	50
7-1-77	55
7-1-78	60
7-1-79	65
7-1-80	70
7-1-81	75
7-1-82	80
7-1-83	85
7-1-84	90
7-1-85	95

provided said state payments shall not be less than seventy-five per cent of total retirement income payments for each fiscal year commencing July 1, 1973; and for each of the fiscal years ending June 30, 1972, and June 30, 1973, respectively, shall be seventy per cent of the total retirement income payments.

(c) Transfer of appropriated amounts from the general fund to the retirement fund shall be made in equal monthly payments during the fiscal year.

(d) No act liberalizing the benefits of the plan shall be enacted by the general assembly until the assembly has requested and received from the retirement commission a certification of the cost of such change under the actuarial funding basis adopted by this act using full normal cost plus forty year amortization.

1975 Amendment

1975, P.A. 75-581, §4, amending subsec. (b), substituted "sixteen" for "fifteen years in the second sentence, increased the percentage for each fiscal year beginning 7-1-75 by 5%, and provided for fiscal year beginning 7-1-86.

Conn.Gen.Stat. §5-162(c)(1)

1958 Revision

Retirement date and retirement income

(c) Schedule 1-Twenty-five or more years of state service.

(1) Each member who has completed twenty-five or more years of state service shall be retired, on his own application or on the application of the executive head of the agency employing him, on the first day of the month named in the application, and on or after the member's fifty-fifth birthday, if a man, or fiftieth birthday, if a woman.

1975 Amendment

1975, P.A. 75-531, §1, amended
subsec. (c)(1) by inserting "Except as
provided in section 5 of this act ", at
the beginning and by deleting", if a
man, or fiftieth birthday, if a woman"
from the end.

Conn.Gen.Stat. §5-162(d)(1)

1958 Revision

Retirement date and retirement income

(d) Schedule 2-Less than
twenty-five years of state service.

(1) Each member who has completed less than twenty-five years of state service shall be retired on his own application, on the first day of the month following his application, if he then meets any one of the following conditions: (A) The member is a woman who has completed five years of state service and reached her sixty-fifth birthday; (B) the member is a woman who has completed ten years of state service and reached her fifty-fifth birthday; (C) the member is a man who has completed ten years of state service and reached his sixtieth birthday.

1975 Amendment

1975, P.A. 75-531, §2, amended subsec. (d)(1) by inserting "Except as provided in section 5 of this act,", by deleting "he then meets any one of the following conditions: (A) The member is a woman who has completed five years of state service and reached her sixty-fifth birthday; (B) the member is a woman who has completed ten years of state service and reached her fifty-fifth birthday; (c)" following "following his application, if", and by deleting "is a man who" following "the member"; . . .

Conn.Gen.Stat. §5-162(d)(3)

1958 Revision

Retirement date and retirement income

(d) Schedule 2-Less than 25 years of state service.

(3) Each member referred to in subdivisions (1) and (2) of this subsection shall receive a monthly retirement income beginning on his retirement date equal to one-twelfth of (A) plus (B): (A) The number of years of his state service, taken to completed months, multiplied by the applicable percentage of his social security earnings determined from the table below for the appropriate age and years of state service; (B) the number of such years multiplied by the applicable percentage of his excess earnings determined from the table below for such age and years of service.

Age of Member on His Retirement Date		Years of State Service	Percentage of Social Security Earnings	Excess Earnings
Man	Woman			
70 and over	65 and over	5 and over *	1.25%	2.50%
65 to 70	60 to 65	10	1.00	2.00
64	59	10	.94	1.88
63	58	10	.88	1.76
62	57	10	.82	1.64
61	56	10	.76	1.52
60	55	10	.70	1.40
59	54	10	.65	1.30
58	53	10	.60	1.20
57	52	10	.56	1.12
56	51	10	.53	1.06
55	50	10	.50	1.00

* Not more than 20 years may be counted for
this age and percentage group

For each full year of service beyond ten, the percentage of social security earnings shall be increased by one-fifteenth of the difference between one and the percentage shown in the above table opposite the age of the retiring employee, and the percentage of excess earnings shall be increased by one-fifteenth of the difference between two and the percentage shown in the above table opposite the age of the retiring employee.

1975 Amendment

1975, P.A. 75-531, §2, amended subsec. (d)(3), by substituting the table for former table which had included separate columns for men and women for age at retirement.

Age of Member on His Retirement Date	Years of State Service **	Percentage of Social Security Earnings	Excess Earnings
70 and over	5 and over *	1.25%	2.50%
65 to 70	10	1.00	2.00
64	10	.94	1.88
63	10	.88	1.76
62	10	.82	1.64
61	10	.76	1.52
60	10	.70	1.40
59	10	.65	1.30
58	10	.60	1.20
57	10	.56	1.12
56	10	.53	1.06
55	10	.50	1.00

* Not more than 20 years may be counted for this age and percentage group.

** Between the ages of fifty-five and sixty, the minimum service requirement is ten years of actual state service.

Conn.Gen.Stat. §5-163(c)

1958 Revision

Early retirement

(c) A member whose state service is terminated because of economy, lack of work or abolition of his position, or who, being an army or air national guard technician in the military department, is dismissed by reason of separation from the national guard because of age, after he has completed twenty-five years of state service but before he has reached his fifty-fifth birthday, if a man, or her fiftieth birthday, if a woman, shall be entitled to a retirement income. The amount of each monthly payment shall be determined from subsection (c) of section 5-162, if the member elects the first day of the month on or after such

birthday as his retirement date; and shall be the actuarial equivalent of such amount, as determined by the retirement commission, if the member elects the first day of the month on or after his termination date as his retirement date.

1975 Amendment

1975, P.A. 75-531, §3, amended the first sentence of subsec. (c) by inserting "Except as provided in section 5 of this act," at the beginning and by deleting "if a man, or her fiftieth birthday, if a woman," following "his fifty-fifth birthday,".

Conn.Gen.Stat. §5-166(a)

1958 Revision

Leaving state service before becoming eligible for retirement

(a) A member who leaves state service before he is eligible for retirement but after completing at least ten years of state service, of which at least five years shall have immediately preceded the date of his leaving state service, shall continue to be a member, and shall be eligible for a retirement income as provided in section 5-162, but on a reduced actuarial basis, as determined by the retirement commission, provided, if such member is a woman she shall be eligible upon reaching her fiftieth birthday and if a man, he shall be eligible upon reaching his fifty-fifth birthday.

1971 Amendment

1973, P.A. 73-171 added, to
subsec.(a), the second sentence.

1975 Amendment

1975, P.A. 75-531, §4, amended the
first sentence of subsec. (a) by
inserting "Except as provided in
section 5 of this act," at the
beginning, and by deleting ", provided,
if such member is a woman she shall be
eligible upon reaching her fiftieth
birthday and if a man, he shall be
eligible" following "as determined by
the retirement commission".

9145H

Karen PINEMAN, Alphonse Marotta,
Daniel Clifford, Judith Narus, Rose
Schewe and Alfred K. Tyll

v.

William G. OECHSLIN, Chairman of
the State Employees Retirement
Commission, Henry E. Parker, Treasurer
of the State of Connecticut, and J.
Edward Caldwell, Comptroller of the
State of Connecticut.

Civ. No. H 77-164.

United States District Court,
District of Connecticut.

April 16, 1980.

- State employees brought action
challenging legislation which
established for all employees
retirement ages which were identical to

the high retirement ages previously applicable only to male employees. The District Court, José A. Cabranes, J., held that statutory amendments which established for all state employees retirement ages that were identical to the high retirement ages previously applicable only to male employees of the state was in violation of the contract clause of the United States Constitution, as that legislation was applied to state employees who had not reached normal retirement age prior to June 30, 1980, and who were such employees on June 30, 1975, since the legislation impaired obligations of contract entered into between state and its employees requiring state to permit those male and female employees to retire on terms of State Employees Retirement Act, and since the impairment could not be justified as

either necessary to serve important public purpose or as being reasonable in light of the surrounding circumstances

Plaintiffs' motion for summary judgment granted.

Paul W. Orth, Hoppin, Carey & Powell, Hartford, Conn., for plaintiffs.

J. Sarah Posner, Asst. Attorney General, State of Connecticut, Carl R. Ajello, Attorney General, Hartford, Conn., for defendants.

MEMORANDUM OF DECISION ON PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT

JOSE A. CABRANES, District Judge.

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Introduction

This action is a sequel to this court's decision in Fitzpatrick v. Bitzer¹. In that case, decided in 1974, Chief Judge Clarie held invalid the provisions of the Connecticut State Employees Retirement Act, Conn.Gen.Stat. Section 5-152 et seq., which required male employees of the state to work five years longer to earn pension benefits than similarly situated female employees. Judge Clarie ruled that these provisions discriminated against men on account of their sex, in violation of Title VII of the Civil Rights Act of 1964, as amended ("Title VII").² The decision in Fitzpatrick was not appealed by the state,³ and Connecticut began to administer its retirement statute in a

manner consistent with the court's ruling, permitting both men and women to retire with full pension benefits at the lower ages formerly applicable only to women.⁴

At the next legislative session, the General Assembly passed Public Act 75-531 ("the 1975 Act"), which amended the portions of the State Employees Retirement Act which this court found to be discriminatory in Fitzpatrick. The 1975 Act established for all employees retirement ages which were identical to the higher retirement ages applicable only to male employees prior to Fitzpatrick.

In this class action, certain male and female employees of the State of Connecticut challenge the constitution-

ality of the 1975 Act. The state concedes that the effect of the 1975 Act was to require the plaintiffs, who had become state employees and remained in the state's service in reliance upon the terms of pre-1975 law (as modified by Judge Clarie's order), to work up to five years longer than that law had required in order to qualify for retirement with full pension benefits. The plaintiffs claim that the 1975 Act therefore impaired the state's pre-existing contractual obligations to them, in violation of the contract clause of the United States Constitution.⁶

The defendants, who are the Connecticut officials ultimately responsible for administering the State Employees Retirement Act, deny that

pre-1975 law gave rise to any contractual obligations. They assert that "a pension is not a matter of contract," but "a gratuity 'springing from the appreciation and graciousness of the sovereign.'"⁶ Accordingly, they argue, the plaintiffs have no rights which fall within scope of the contract clause, even though (as they admit) the state required the plaintiffs to become members of the State Employees Retirement System and to contribute substantially to the fund out of which benefits are paid, and the plaintiffs joined and remained in the state's employ in reliance upon the terms of pre-1975 law.

With due respect, the court declines to follow the defendants' reasoning. Rather, on the basis of the

uncontested facts before the court on the plaintiffs' motion for summary judgment, the court finds that the state entered into a contractual relationship with the plaintiffs, pursuant to which the state bound itself to permit the members of the plaintiff class to retire from state service on the terms provided by the law which was in effect immediately prior to the adoption of the 1975 Act. The court further finds that the 1975 Act severely impaired the state's contractual obligations to this class of its employees, and that this impairment is unconstitutional under the criteria set forth by the Supreme Court, for the state has not argued, much less established, that the abrogation of its contractual obligations was either necessary for

the achievement of the state's purposes or reasonable in light of the circumstances.

Because the 1975 Act, as applied to the plaintiffs, violates the contract clause of the United States Constitution, the plaintiffs' motion for summary judgment is granted. An injunction shall be issued against the enforcement of the 1975 Act with respect to those state employees who were in state service on June 30, 1975 (the effective date of the 1975 Act), are still in the state's service, and will not be eligible to retire with full pension benefits prior to June 30, 1980.⁷

Among the plaintiffs to whom the court grants relief from the challenged

statutory provisions are female state employees who entered state service prior to the enactment of the 1975 Act. The state has admitted that all of these class members relied on the promise of pension benefits set forth in the pre-1975 version of the State Employees Retirement Act, both before and after it was modified by the decision in Fitzpatrick. The court also grants similar relief to male employees who entered state service prior to the adoption of the 1975 Act. It may be suggested that this decision grants a "windfall" to those male class members who entered state service before this court's decision in Fitzpatrick by permitting them to retire on terms more favorable than the ones upon which they relied under prior law. However, the court is bound by

the state's admission that these class members either expected to become eligible for pension benefits on terms as favorable as those extended to female employees under pre-Fitzpatrick law, or remained in state service after the Fitzpatrick decision in reliance upon the promise of benefits identical to those of female employees which was held out to them by the state following that decision. Moreover, even apart from the question of the expectations of this group of class members, all males who were in the state's employ at the time of the Fitzpatrick decision became entitled, under the terms of Judge Clarie's order, to retire on the terms applicable to similarly situated female employees under the former law. The court cannot deny any males in the plaintiff class the right to retire on

the terms to which similarly situated female class members are entitled without in effect undoing Judge Clarie's decision in Fitzpatrick.

Nothing in this ruling affects the application of the 1975 Act, on a prospective basis, to employees who were not in the state's service on June 30, 1975, and who therefore had no contractual rights to retire on the more advantageous terms afforded by prior law. The court holds only that the retroactive application of the more stringent requirements for pension eligibility contained in the 1975 Act to the discrete class of state employees who brought this action is unconstitutional.

The rules on retirement ages enforced by this decision are those

embodied in contractual arrangements between the state and its employees prior to June 30, 1975. In holding the 1975 Act unconstitutional to the extent that it changed those rules retroactively as applied to the plaintiffs, the court makes no judgment concerning the wisdom of the pension policies which the state enforced prior to the enactment of the 1975 Act, or, indeed, concerning the policies embodied in the 1975 Act. Any harm to the state treasury which may be caused by the court's enforcement of the state's contractual obligations-and the state has neither shown nor suggested the existence of such harm-is the direct result of obligations assumed by the state itself and of prior judicial determinations, binding on the state, which required that Connecticut's male

employees be accorded the same rights as female employees under the state's retirement system.

I. THE PARTIES

The plaintiff class, as certified in this court's order of February 20, 1979, consists of "all existing employees of the State of Connecticut who will not reach normal retirement age prior to June 30, 1980 and who were such employees on June 30, 1975."⁸ It includes both male and female employees. The phrase "normal retirement age" refers to the age at which employees are permitted to retire with pension benefits, under the State Employees Retirement Act, without regard to special provisions for early retirement.⁹

The defendants are William G. Oechslin, chairman of the State Employees Retirement Commission, Henry G. Parker, Treasurer of the State of Connecticut,¹⁰ and J. Edward Caldwell, Comptroller of the State of Connecticut and Secretary of the State Employees Retirement Commission¹¹. The State Employees Retirement Commission is responsible for administering the State Employees Retirement System and all other retirement systems of the State of Connecticut except the Teachers' Retirement Fund. Conn.Gen.Stat. §5-155(d). Nearly all of Connecticut's employees are required by law to belong to the State Employees Retirement System.¹²

The members of the State Employees Retirement System must choose one of two benefit plans. The first of these plans is independent of the federal Social Security program; the other is coordinated with it. See Conn.Gen.Stat. §§ 5-157, 5-158a-g. Under either plan, the employees are required to make contributions to the State Employees Retirement Fund, out of which the members' retirement benefits are paid. Indeed, employees have been required to contribute to the retirement fund since 1939, when the retirement system was established.¹³

An employee not covered by Social Security must contribute 5% of his or her salary to the fund, Conn.Gen.Stat. §5-161(b), while an employee who has Social Security coverage must

contribute to the fund an amount equal ,
to 2% of that part of his or her salary
on which the state makes Social
Security contributions plus 5% of the
remainder of his or her salary,
Conn.Gen.Stat. §5-161(a). Actuarial
studies by the state demonstrate that,
depending upon the plan selected, the
age of retirement and the sex of the
employee, between 12% and 25% of an
employee's benefits is attributable to
his or her contributions, including the
interest accrued on those
contributions.¹⁴ The balance of the
benefits paid out of the State
Employees Retirement Fund is
attributable to appropriations by the
state. See Conn.Gen.Stat. §5-156a.

II. THE FACTUAL BACKGROUND

The facts relevant to the pending motion are rather complex. However, they are not in dispute.¹⁵ Much of the factual background is a matter of public record, particularly the record of the Fitzpatrick litigation. The other relevant facts were admitted by the defendants or stipulated by the parties.

A. The Fitzpatrick Litigation

A brief recapitulation of the history of the Fitzpatrick litigation is the logical starting point for the narrative of the facts relevant here. The Fitzpatrick plaintiffs were members of the class of male state employees and former employees who belonged to

the State Employees Retirement System.

Fitzpatrick v. Bitzer, supra, 390

F.Supp. at 279. They challenged the following statutory provisions then in effect:

(1) Former Conn.Gen.Stat.

§5-162(c)(1), which allowed an employee with 25 years of state service to retire with pension benefits "or or after the member's fifty-fifth birthday, if a man, or fiftieth birthday, if a woman";

(2) Former Conn.Gen.Stat.

§5-162(d)(1), which allowed any female employee with at least 10, but less than 25, years of state service to retire with pension benefits at age 60, but only permitted a male employee who had served for that period of time to

retire with pension benefits at age 65;¹⁶

(3) Former Conn.Gen.Stat.

§5-162(d)(3), which provided that the calculation of retirement benefits be made according to a table based on age and sex, which ensured that a female retiree would receive retirement benefits equal to those received by a male retiree five years her senior;

(4) Former Conn.Gen.Stat.

§5-163(c), which permitted an employee whose state service was terminated under one of certain enumerated conditions to retire with pension benefits after the completion of 25 years of state service "before he has reached his fifty-fifth birthday, if a man, or her fiftieth birthday, if a woman. . . ."; and

(5) Former Conn.Gen.Stat.

§5-166(a), which provided that, in certain circumstances, an employee who left state employment before reaching the normal age of eligibility would be eligible for retirement income, on a reduced actuarial basis, at age 55 if male, or age 50 if female.

See Fitzpatrick v. Bitzer, supra, 390 F.Supp. at 281.

In Fitzpatrick, Judge Clarie held that these statutory provisions violated Title VII of the Civil Rights Act of 1964, as amended in 1972.¹⁷ Fitzpatrick v. Bitzer, supra, 390 F.Supp. at 288. The court granted the plaintiffs' request for injunctive relief, prohibiting the defendants from administering the State Employees

Retirement Act in a discriminatory manner in the future. Id. at 290.

The court's order stated:

"The defendants are accordingly ordered to administer the State Employees' Retirement Act without unreasonable sex classifications unfavorable to men as they relate to retirement age and benefit computations; so that men will be eligible to retire at age 50 and receive the same treatment as similarly situated women. Nothing herein shall be construed to interfere with the State Legislature performing its constitutional function of freely determining public policy, as it pertains to deciding upon a uniform retirement age for all men and women employees of the State of Connecticut in the future, provided the same is carried out without discrimination as to age or benefits on the basis of sex."

390 F.Supp. at 290 (emphasis added).

As a result of this order, from which, as noted, the state did not appeal,¹⁸ the State of Connecticut enforced the existing provisions of the State Employees Retirement Act so that men were treated precisely as women

previously had been treated. Men with 25 years of continuous service were thus permitted to retire at age 50 after Judge Clarie's order; other men in state service were likewise permitted to retire upon the terms applicable to similarly situated females.¹⁹

B. The Plaintiffs' Reliance on
Pre-1975 Law

Through admissions and exhibits obtained from the defendants, the plaintiffs have established the following facts relevant to the question of the plaintiffs' reliance on the law as it stood prior to the 1975 Act.²⁰

At least since 1971, employees and prospective employees of the State of

Connecticut have been made aware of the retirement benefits available to them under state law, at or before the time they were hired. Moreover, prospective employees have frequently inquired, before entering the state's employ, about Connecticut's retirement benefit laws, the State Employees Retirement System and the benefits to which they would be entitled if they became state employees. The booklet which the state distributes to new employees to describe the State Employees Retirement System declares: "You may retire--and receive immediate retirement benefits--at any time after you reach the minimum permissible retirement age." Nowhere in that booklet does the state expressly reserve the right to change the minimum permissible retirement ages, and the defendants have not argued that the state ever

conveyed to the plaintiffs any intention to reserve such rights.

State employees rely upon the information which the state conveys to them about its retirement laws, systems and benefits, without regard to subsequent changes adverse to them. Indeed, some of the plaintiffs accepted state employment, leaving otherwise more lucrative positions, because of superior retirement benefits available to them as state employees.

After joining state service, Connecticut's employees frequently inquire about retirement benefits, including the options available to them under state law and the ages at which state law entitles them to retire with benefits. The information which state employees learn from such inquiries is

a material and substantial factor in their personal retirement plans. Accordingly, the terms of the State Employees Retirement Act are substantial inducements for prospective employees to enter state service and for those already in the state's employ to remain in state service.

The law upon which female members of the plaintiff class relied was the State Employees Retirement Act, as it read prior to its amendment in 1975. The provisions of that law which governed the retirement ages and benefits of women were in no way affected by the decision of the court in Fitzpatrick.

Prior to that decision, which was filed on September 16, 1974, the law upon which most male employees relied

contained the discriminatory provisions--requiring men to work longer than women to become eligible for equivalent benefits--which were held unlawful in Fitzpatrick. It is admitted, however, that even before the Fitzpatrick decision was announced, "an indeterminate number of male state employees believed that they would obtain, through legislative or judicial action, equal treatment with women under the state's retirement laws, i.e., that the retirement ages and benefits applicable to women would be made available to them through a change in the laws." In any event, the Fitzpatrick decision changed the law to enable men to retire on the terms formerly applicable only to women, and between September 1974 and June 1975 both prospective employees and men already in state service learned,

either from pension benefit information disseminated by the state or from other sources, that the retirement ages and benefits applicable to men had, by virtue of the court's order, become identical to those applicable to women. The law upon which male members of the plaintiff class were relying just before the adoption of the 1975 Act was therefore the rule articulated by Judge Clarie in Fitzpatrick: men already in state service had the right to retire at the same ages and with the same levels of benefits as female state employees. See Fitzpatrick v. Bitzer, supra, 390 F.Supp. at 290.

C. The 1975 Act

The 1975 Act amended the State Employees Retirement Act in a number of ways. As the plaintiffs contend, and

the defendants concede,²¹ the thrust of the amendments was to require certain employees, both male and female, to work as many as five years longer than they were required to work by prior law (i.e., the State Employees Retirement Act, as modified by this court's decision in Fitzpatrick) in order to obtain the same level of pension benefits. The 1975 Act did not have this effect on all employees, for it contained a "grandfather clause"²² which exempted from the more stringent age requirements for eligibility those employees who would reach, before June 30, 1980, the lower age threshold imposed by prior law; as a result of this provision, the 1975 Act affected only the plaintiffs and those who entered state service after June 30, 1975.

The specific statutory provisions which the plaintiffs challenge are the following:

(1) Amended Conn.Gen.Stat.

§5-162(c) and 5-162(d), which require an employee to reach the age of 55, if he or she has completed 25 years of state service, or the age of 60, if he or she has completed at least 10 but less than 25 years of state service, before retiring with benefits.

Immediately prior to the enactment of these amended provisions, such employees could retire with benefits at ages 50 and 55, respectively. These subsections also establish benefit schedules which reduce the levels of retirement benefits that some members of the plaintiff class can expect.

(2) Amended Conn.Gen.Stat.

§5-163(c), which provides that an employee whose state service is terminated under certain conditions^{2 3} is entitled to retirement benefits if he or she has completed 25 years of state service, but has not yet reached his or her 55th birthday. The applicable age for such an employee had been 50 under the law which had been enforced by the state immediately prior to the adoption of the 1975 Act.

(3) Amended Conn.Gen.Stat.

§5-166(a), which provides that an employee who leaves state service under certain conditions before becoming eligible for retirement with pension benefits under other provisions of the statute^{2 4} shall nonetheless be eligible for a pension on a reduced actuarial basis upon attaining the age

of 55. Under the law as applied immediately prior to the enactment of the 1975 Act, such an employee was eligible for these benefits at age 50.

(4) Conn.Gen.Stat. §5-163a, which permits any employee reaching either (a) the age of 50 and his or her 25th year of state service, or (b) the age of 55 and his or her 10th year of state service, prior to June 30, 1980 to retire with a pension at full benefit levels before that date. This provision protected these classes of state employees from the more stringent age qualifications embodied in other provisions of the 1975 Act, but left the members of the plaintiff class exposed to the more restrictive standards of the new law.

The effects of these provisions of the 1975 Act on the named individuals who represent the plaintiff class illustrate the types of injuries which the 1975 Act inflicts upon the plaintiffs' expectations.²⁵ For example, plaintiff Karen Pineman, who is now 44 years old, has been in continuous state service since January 16, 1956. Under former Conn.Gen.Stat. §5-162(c)(1), which, as applied to female employees, was unaffected by Judge Clarie's 1974 order, she could have expected to retire with pension benefits at age 50--i.e., in 1986. The 1975 Act requires her to work an additional five years--until 1991--to receive benefits at the same levels.

Plaintiff Alphonse S. Marotta is in an analagous position. He is 45 years old and has been in continuous state

service since June 20, 1955. Former Conn.Gen.Stat. §5-162(c)(1) would have required him, solely as a consequence of his sex, to work until his 55th birthday in order to obtain the benefits due him as a 25 year veteran of continuous state service. However, the order of this court in Fitzpatrick, which required the state to administer its retirement statute "so that men will be eligible to retire at age 50," changed the expectations of men in Mr. Marotta's position. After the court's order in Fitzpatrick, but before June 30, 1975 (the effective date of the 1975 Act), such male employees were permitted to retire with pension benefits at age 50. Indeed, the 1975 Act continued to allow retirement with full benefits at age 50 for employees who had served the state for 25 years and reached age 50 before June 30,

1980. Conn.Gen.Stat. §5-163a.

However, because Mr. Marotta will not reach age 50 until after June 30, 1980, under the 1975 Act he will have to wait until his 55th birthday, in 1990 (rather than his 50th birthday, in 1985), to retire with pension benefits.

Plaintiff Alfred K. Tyll is in a similar situation. He is 48 years old and will have completed 25 years of continuous state service by June 30, 1980. The 1975 Act requires him to work until age 55-i.e., 1987--before he may retire with pension benefits; the law in effect after Fitzpatrick but before the 1975 Act would have permitted his retirement with full benefits in 1982, when he turns 50. Under the 1975 Act, Mr. Tyll is eligible for full retirement benefits only after working five years longer

than he would have been required to work under prior law.

The 1975 Act forces some employees to choose between working longer than previous law would have required in order to receive retirement benefits at the levels they expected and retiring prematurely with retirement income calculated at lower benefit levels. For example, plaintiff Daniel Clifford, who is 47 years old and began state service on September 15, 1959, would have been entitled to a full pension in 1984 (after 25 years of service) but for the 1975 Act. However, its provisions require him either to work until 1988, when he reaches the age of 55 and thereby qualifies for retirement with full pension benefits, or to retire before that time with vested retirement income on a reduced

actuarial basis, pursuant to amended Conn.Gen.Stat. §5-166(a). If he chooses the latter option, Mr. Clifford will receive something less than the full pension benefits at age 50 which he would have obtained had the 1975 Act's retroactive provisions not become law. Plaintiff Judith Narus is put to the same choice by the 1975 Act; she may either work longer than prior law required to receive benefits at the usual full pension levels, or retire before reaching her 55th birthday and accept benefits calculated at a lower level.

Finally, the practical effect of the 1975 Act is to reduce the benefits of some plaintiffs who have served the state for less than 25 years, pursuant to the benefit schedule set forth in amended section 5-162(d). For example,

under prior law, plaintiff Rose Schewe, who will have completed fifteen years of state service on September 10, 1980, would have received monthly benefits including 2.5% of her earnings in excess of the amount on which the state made Social Security contributions, multiplied by her years of service. However, under the 1975 Act, this component of her benefits will be calculated on the basis of a 2.0% multiplier for "excess earnings" if she retires after reaching age 65, but before her 70th birthday. Only if she continues to work until she reaches age 70 will Ms. Schewe become eligible, under the 1975 Act, to receive benefits calculated at the 2.5% rate to which she would formerly have been entitled at age 65.

D. The Legislative History of the 1975 Act

The 1975 Act had its origins in House Bill 5176, which was introduced on the floor of the Connecticut House of Representatives on June 3, 1975. See General Assembly Proceedings 1975: House of Representatives 6342-43. The original version of this bill would have raised the retirement age only for those who would become state employees after June 30, 1975. It did not purport to have any retroactive effect. The bill was, however, amended on the floor to provide that one group of employees already in state service--the members of the plaintiff class--would, along with future generations of state employees, be subject to the more stringent age qualifications for pension

eligibility. In the words of the amendment's sponsor, "[t]his amendment restores males who are under age 45 to the [age] 55 retirement that was in effect before the recent Court decision, and it establishe[s] age 55 for females who are presently under age 45." Id. at 6346 (remarks of Rep. Wright).

After brief debate, the House passed the bill, as amended. Id. at 6362. The next day, the Senate passed the bill in the same form. General Assembly Proceedings 1975: Senate 3590. Neither the House of Representatives nor the Senate held public hearings on the legislation which became the 1975 Act. See id. at 3582 (remarks of Sen. Rome).

Although there are no formal reports explaining the legislature's purpose in passing the 1975 Act, it is clear from the debates in both houses that the General Assembly was reacting to the decision in Fitzpatrick with a view toward achieving two related objectives: (1) putting an end to Connecticut's policy of permitting certain state employees to retire with pension benefits at age 50, which many legislators believed to be an unduly early retirement age, and (2) saving money by reducing the expenses which the state incurs to fund its share of the State Employees Retirement System.

On the House floor, the amended bill's sponsor, Representative Wright, brought these two aims of the legislation into sharp focus. Condemning past Connecticut policy

which allowed some state employees to retire at age 50, he said: "I don't think there is any other state or probably any municipality that has a retirement age that allows employees to retire at age 50 and receive 50% of their pay. This is far more liberal than is provided in [sic] any public employer, and one that I think if we don't correct it can bankrupt the State of Connecticut." General Assembly Proceedings 1975: House of Representatives 6346. Citing a report which estimated that the amended bill would save between \$3,000,000 and \$5,000,000 in 1975-76, Representative Wright added, "I'm sure the House will be able to find a place to use that three to five million dollars, should this amendment pass." Id. Another proponent of the amended bill,

Representative Dice, stated:

"[T]here are very few, if any, retirement plans where you can retire at age 50. The only one that I know is the military service, and I hope our state employees are not equivalent to being in the military service, where they would have to go overseas to that extent."

Id. at 6347-48. Representative Dice added that Connecticut faced the risk of bankruptcy if it did not reduce its pension obligations, comparing the situation to that of New York City.

Id. at 6348. Representative Mannix offered a similar assessment of the situation:

"Most, if not all, of the taxpayers who have a retirement plan in the State of Connecticut can normally retire at age 60. They're being asked by us and the government of the State to underwrite a retirement plan at age 50. To me, this is inexcusable. Something's got to be done. If we continue on this way, as has been pointed out, we're going to end up in bankruptcy."

Id. at 6348.

The day after the amended bill cleared the House, the Senate took up the measure. The remarks made by the bill's supporters in the upper chamber paralleled those made by its advocates in the House. Senator Hennessey expressed the view that "we're just trying to straighten out a Court decision." General Assembly Proceedings 1975: Senate 3579. The thrust of the position of the bill's supporters was that "50 years of age is an unreasonable age for retirement," id. at 3578 (remarks of Sen. Amenta); see also id. at 3582 (remarks of Sen. Fauliso); id. at 3588 (remarks of Sen. Ciarlone), and that the bill would save Connecticut \$3,600,000 in the next fiscal year alone, see id. at 3575 (remarks of Sen. Baker); id. at 3586-87 (remarks of Sen. Houley). A study prepared by the actuary of the pension

fund was reported to have established that, in fiscal year 1975-76, the state would save \$800,000 by prospectively raising the retirement age for new employees, and another \$2,800,000 by extending that provision to those persons already in the state's employ who would not be eligible to retire with pension benefits under after June 30, 1980-i.e., the plaintiffs in this action. Id. at 3587 (remarks of Senator Houley). As Senator Houley noted, enacting the amended bill would permit the state to start realizing savings on its appropriations for the State Employees Retirement Fund in the very fiscal year for which the legislature had just passed a budget. Id.

III. THE PLAINTIFFS' CLAIMS

The plaintiffs' principal contention is that the 1975 Act operates to impair the state's contractual obligations to them, in violation of the contract clause of the United States Constitution.²⁶ They seek a declaratory judgment establishing that the 1975 Act, as applied to the plaintiff class, is unconstitutional, as well as injunctive relief requiring the defendants to administer the State Employees Retirement Act, insofar as it applies to the plaintiffs, without regard to the provisions of the 1975 Act. They do not challenge the constitutionality of the prospective application of the 1975 Act to those who became state employees after June 30, 1975.

The plaintiffs would require the state to permit them to retire with full pension rights (a) upon completion of 25 years of continuous state service, at age 50; and (b) upon completion of at least 10, but less than 25, years of continuous state service, at age 55. In addition, the terms of retirement and the benefit levels for which the plaintiffs would be eligible would be those which were applied to all state employees retiring in the period after this court's Fitzpatrick decision, but prior to the 1975 Act. These are the same terms and benefits which the state--consistently with Title VII--afforded all employees, regardless of sex, immediately after the Fitzpatrick decision, and which were preserved by the 1975 Act for those employees covered by its "grandfather clause," Conn.Gen.Stat. §5-163a.

IV. THE CONTRACT CLAUSE OF THE UNITED STATES CONSTITUTION

A. Introduction

[1] The constitutional provision invoked by the plaintiffs reads simply: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . U.S. Const. art. I, §10, cl. 1. However, the analysis of a contract clause challenge to state legislation is anything but simple. While the language of the Constitution is, on its face, absolute, a substantial body of Supreme Court cases demonstrates that the contract clause does not prohibit every impairment by a state of contractual obligations. See, e.g., El Paso v. Simmons, 379 U.S. 497, 85 S.Ct. 577, 13 L.Ed.2d 446 (1965); Home Building & Loan Association v.

Blaisdell, 290 U.S. 398, 54 S.Ct. 231, 78 L.Ed. 413 (1934).²⁷ Nonetheless, the Supreme Court has recently reminded us that the contract clause "is not a dead letter," Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241, 98 S.Ct. 2716, 2721, 57 L.Ed.2d 727 (1978), and that it requires particularly careful examination of state legislation which impairs a contract to which the state itself is a party, id. at 244 n.15, 98 S.Ct. at 2722 n.15; United States Trust Co. v. New Jersey, 431 U.S. 1, 22-23, 25-26, 97 S.Ct. 1505, 1517-1518, 1519, 52 L.Ed.2d 92 (1977).

In United States Trust Co., the Court, in an opinion by Justice Blackmun, reaffirmed the continuing vitality of the contract clause in modern constitutional law:

"Both [Home Building & Loan Association v. Blaisdell and El Paso v. Simmons, supra] eschewed a rigid application of the Contract Clause to invalidate state legislation. Yet neither indicated that the Contract Clause was without meaning in modern constitutional jurisprudence, or that its limitation on state power was illusory. Whether or not the protection of contract rights comports with current views of wise public policy, the Contract Clause remains a part of our written Constitution."

431 U.S. at 16, 97 S.Ct. at 1514.

In United States Trust Co., as here, the question was whether a state law violated the contract clause by impairing a state's own contractual obligations to private parties. At issue there was the constitutionality of a 1974 New Jersey statute which, together with an identically worded New York statute, repealed a 1962 covenant (itself embodied in legislation enacted by both states) limiting the ability of the bi-state Port Authority of New York

and New Jersey to use its revenues and reserves to subsidize unprofitable rail passenger transportation between the two states. The plaintiff, a New York bank, was a substantial holder of Port Authority bonds subject to the covenant and was a trustee for two series of such bonds.

The Court in United States Trust Co. held that the retroactive appeal of the 1962 covenant was an unjustifiable impairment of the state's contractual obligations to the plaintiff, in violation of the contract clause. Citing such venerable authority as Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-39, 3 L.Ed. 162 (1810) and Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 4 L.Ed. 629 (1819), the Court observed that "[i]t long has been established

that the Contract Clause limits the power of the States to modify their own contracts as well as to regulate those between private parties." United States Trust Co. v. New Jersey, supra, 431 U.S. at 17, 97 S.Ct. at 1515. At the same time, the Court noted, "the Contract Clause does not prohibit the States from repealing or amending statutes generally, or from enacting legislation with retroactive effects." Id. (footnote omitted).

[2] Where, as here, it is claimed that the contract clause prohibits a state's statutory modification of its own obligations, the court must determine whether contractual obligations within the purview of the contract clause exist; if so, whether the state legislation under attack impaired those obligations; and if

there is an impairment of contract, whether it is forbidden by the Constitution. See generally United States Trust Co. v. New Jersey, supra, 431 U.S. at 21-32, 97 S.Ct. at 1517-1522.

B. Connecticut's Contractual Obligations to the Plaintiffs

[3,4] A statute gives rise to a contractual obligation which is subject to the contract clause "when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." United States Trust Co. v. New Jersey, supra, 431 U.S. at 17 n. 14, 97 S.Ct. at 1515 n. 14. In its inquiry into the existence of a contract within the meaning of the contract clause, a

federal court must "accord respectful consideration and great weight" to relevant state law, Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100, 58 S.Ct. 443, 446, 82 L.Ed. 685 (1938), although it is not bound by the state's law of contracts. Irving Trust Co. v. Day, 314 U.S. 556, 561, 62 S.Ct. 398, 401, 86 L.Ed. 452 (1942). See generally Hale, The Supreme Court and the Contract Clause: III, 57 Harv.L.Rev. 852, 852-72 (1944). Accordingly, the appropriate starting point for this court's examination of the question whether Connecticut's State Employees Retirement Act created contractual obligations to state employees is the common law of the State of Connecticut.

1. Contractual Obligation in
 Pension Plans Under
 Connecticut Law

[5] In the leading case of Bird v. Connecticut Power Co., 144 Conn. 456, 133 A.2d 894 (1957), the Connecticut Supreme Court of Errors held that a non-contributory pension plan in which employees were not required to participate created contractual rights enforceable against a private employer. In Bird, the court rejected, in no uncertain terms, the employer's argument that, as a matter of law, it had complete discretion to modify its employees' expectations of pension benefits:

"A board of directors cannot legally strip an employee of the benefits of a pension plan where the employee has complied with the terms of the offer of a pension, since the purposes of the plan could be readily frustrated at the

whim of the directors. . . . Even where an employer declares the plan is within the absolute discretion of the directors, the court will interpret the plan as a whole so as to give effect to its general purpose in securing the loyalty and continued service of the employees, and the employer may not defeat the employees' reasonable expectations of recovering the promised reward. . . ."

Bird v. Connecticut Power Co., supra,
144 Conn. at 463, 133 A.2d at 897
(citations omitted).

In Wyper v. Providence Washington Insurance Co., 533 F.2d 57 (2d Cir. 1976), the court affirmed a decision by Judge Blumenfeld of this court, following Bird and holding that under Connecticut law, "a pension plan creates contractual rights and . . . court review may not be defeated through reservation of discretionary powers in the pension board." Id. at 63 (footnote omitted). In Wyper,

which, like Bird, involved a private employer's pension plan, Judge Gurfein reiterated the contractual nature of pension rights under Connecticut law:

"Later Connecticut opinions citing Bird treat it only as establishing that informal pension plans give rise to contractual rights which cannot be defeated by assertion of discretionary power, and we agree. See Bordon v. Skinner Chuck Co., 21 Conn.Supp. 184, 150 A.2d 607, 610 ([Super.Ct.Hartford Cty.] 1958); Ellis v. Emhart Mfg. Co., 150 Conn. 501, 191 A.2d 546, 549 (1963)."

533 F.2d at 63 n.9.

If an "informal" pension plan in which employees are not required to participate and to which they contribute nothing of pecuniary value creates a binding contract, it would seem to follow, a fortiori, that a highly structured and formal pension plan--like the State Employees Retirement System--in which the employees must participate and into which they must make monetary

contributions gives rise to obligations and rights which are contractual in nature. Further examination of relevant Connecticut cases confirms this impression and strongly suggests that the rationale of Bird, Wyper and the cases cited therein applies with equal force to the facts of this case.

In Bird, the court emphasized that the employee "gave up other opportunities for employment because of the security he felt the pension benefits of the defendants afforded him." Bird v. Connecticut Power Co., supra, 144 Conn. at 462, 133 A.2d at 897. Indeed, the very purpose of the defendants' offer of a pension was to induce the plaintiff to act as he did; "securing the loyalty and continued service of the employees" was the employer's goal in offering pension

benefits. Id., 144 Conn. at 463, 133 A.2d at 897²⁸ Similarly, in Bordon v. Skinner Chuck Co., supra, the Superior Court, following Bird, stressed that the offer of a pension-like "bonus" may act not only as an inducement for a prospective employee to accept the offered position, but also as an incentive for one already in the employer's service to remain in his or her job. If the effect of such a promise is "to induce the employee to refrain from quitting, and in reliance thereon he does refrain, then there is sufficient consideration to support an enforceable contract." Bordon v. Skinner Chuck Co., supra, 21 Conn. Supp. at 190, 150 A.2d at 610.²⁹

In Bird and its progeny, the Connecticut courts held that an

employee who relies upon an offer of deferred benefits to his or her detriment, and to the benefit of the employer who gains the employee's valuable services and loyalty as a consequence thereof, has expectations which are protected by the law of contracts. The facts in the case at bar demonstrate the existence of precisely this type of reliance. The state has admitted that the plaintiff class consists entirely of persons who either accepted state employment, eschewing otherwise more lucrative job opportunities to work for Connecticut, in reliance upon the promises of pensions contained in pre-1975 law, or who remained in state service, foregoing other employment opportunities, in reliance upon the law as modified by Judge Clarie's decision in Fitzpatrick. Under the logic of

Bird and similar cases decided under Connecticut law, the plaintiffs' relationships with the state with respect to their expected pensions are contractual in nature.

This conclusion is confirmed by the application of basic and long-standing principles of contract law to the admitted facts of the instant case. The common law of contracts clearly protects, in various contexts, the type of reliance interest which, the defendants concede, the plaintiffs possessed prior to the enactment of the 1975 Act. See, e.g., Fisk v. Policy Jury of Jefferson, 116 U.S. 131, 133-34, 6 S.Ct. 329, 330, 29 L.Ed. 587 (1885) (implied contract theory protects reliance interest of public officer who performs services on the basis of a promise of a salary level

embodied in legislation); Restatement (Second) of Contracts §§ 90 (Tent. Draft No. 2, 1965), 45 (Tent. Draft No. 1, 1964).³⁰ See generally 1A Corbin on Contracts §§ 193-207 (1963 ed.); Fuller & Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 337 (1936-37).

Indeed, the courts of Connecticut have been in the forefront of this common law development, conferring the protection of the law of contracts on the reliance interests of promisees in positions like those of the plaintiffs here even before the first Restatement of Contracts was published. In State ex rel. March v. Lum, 95 Conn. 199, 111 A. 190 (1920), the Supreme Court of Errors held that teachers who were promised a salary increase by a school board, and who relied in silence upon

that promise, forbearing from exercising their options to leave their jobs, had a contractual right to the increase in pay. In the court's words, the teachers "gave up something that was legally theirs, and the town has received the benefit of their surrender." State ex rel. March v. Lum, supra, 95 Conn. at 204, 111 A. at 192. This, the court held, brought the teachers' case within the rule of Rice v. Almy, 32 Conn. 297, 304 (1864):

"[I]f a man by a promise induces the promisee. . . to do some act or part with some chattel, title, interest, privilege, or right, which the law regards as of some value, there is sufficient consideration for the promise."

State ex rel. Marsh v. Lum, supra, 95 Conn. at 204, 111 A. at 192. See also Tilbert v. Eagle Lock Co., 116 Conn. 357, 361-62, 165 A. 205, 207 (1933). As in Marsh, the plaintiffs' forbearance, which in this case was

induced by the state's offer of pension benefits on the terms in effect prior to the 1975 Act, constitutes consideration--even apart from the plaintiffs' contributions to the State Employees Retirement Fund--for the state's promise.

The contributions which the plaintiffs have made to the State Employees Retirement Fund since becoming state employees further support the conclusion that their relationships with the state are contractual in nature. Standing alone, these payments, which are required as a condition of entering the remaining in state service, constitute consideration under Connecticut law. See e.g., Osborne v. Locke Steel Chain Co., 153 Conn. 527, 531, 218 A.2d 526, 529 (1966) (defining consideration as "a

benefit to the party promising, or a loss or detriment to the party to whom the promise is made"); Finlay v. Swirsky, 103 Conn. 624, 631, 131 A. 420, 423 (1925) (same). This conclusion is in no way affected by the fact that the contributions of employees comprise but a fraction--albeit a substantial one³¹--of the benefits paid out of the retirement fund, for the size of the benefit or detriment which constitutes consideration is irrelevant under Connecticut law. See Osborne v. Locke Steel Chain Co., supra, 153 Conn. at 532, 218 A.2d at 530; Clark v. Sigourney, 17 Conn. 511, 517 (1846); see generally 1 Corbin on Contracts §127 (1963 ed.). Indeed, courts in other jurisdictions have held that the fact that a public employee must make contributions to a pension fund compels

a finding that his or her expectations are enforceable contract rights, not mere gratuities. See, e.g., Campbell v. Judges' Retirement Board, 378 Mich. 169, 179-80, 143 N.W.2d 755, 757 (1966) (state court judges' pensions); Hickey v. Pension Board, 378 Pa. 300, 305-07, 106 A.2d 233, 235-36 (1954) (city employees' pensions).

2. Mere "Gratuities" or Contractual Rights?

Not surprisingly, the defendants do not question the plaintiffs' strong reliance interest or the existence of consideration sufficient to support a contract. Nor do they dispute that under Connecticut law the plaintiffs would possess enforceable contractual rights if this case arose in the context of a private employer's pension

plan. Rather, the defendants' principal argument is that because the state is their employer, the plaintiffs possess mere "gratuities" offered them by a sovereign, rather than rights conferred by contract law.³² This proposition is, however, supported neither by Connecticut precedent nor logic.

No Connecticut court has been called upon to consider whether a public employee's expectation of pension benefits, like that of the private employee in Bird is contractual in nature. The only indication that it is possible that the Bird rule might not apply to the case at bar is to be found in ambiguous dicta in an opinion of the Supreme Court of Errors written fifteen years prior to Bird. In State ex rel. Kirby v. Board of Fire

Commissioners, 129 Conn. 419, 29 A.2d 452 (1942), the court affirmed a judgment for a retired Hartford fireman who sought a pension which was provided for by the city charter, but which the board administering the pension plan declined to award him. In rejecting one of the board's arguments, the court wrote:

"The defendants further contend that the plaintiff had no vested right to retirement but that his retirement lay in the discretion of the board. It may be true that under retirement acts generally even where the person eligible for retirement has contributed by way of dues or assessments to make up the retirement fund he has no vested right to retirement. That does not mean, however, that a charter provision granting retirement rights may be overridden by a municipal board so as to deprive an employee of his right to retirement as fixed by the charter. . ."

State ex rel. Kirby v. Board of Fire Commissioners, supra, 129 Conn. at 426, 29 A.2d at 455-56 (emphasis added) (citation omitted).

Insofar as it might be relevant here, this language is inconclusive. On the one hand, the court suggested that "it may be true," as a general proposition, that no contractual rights arise from statutory employee pension plans. On the other hand, the court found that the city charter granted the plaintiff "his right to retirement" with the benefits promised by the city; this implies that, at least in some unspecified circumstances, public employees may have contractual rights to pensions provided by law.

To the limited extent that the ambiguous Kirby dicta do appear to support the defendants' argument that a state pension is merely a "gratuity", such language is of highly uncertain precedential value after Bird v. Connecticut Power Co., supra. The

contention of the defendants in Kirby that a pension board has complete discretion to deprive an employee of the pension which he expected under the terms of the board's earlier offer was not squarely addressed by the court in that case. However, this notion was expressly rejected, at least as applied to the private sector, in Bird, where the court gave no indication that its holding should be limited to cases involving private employers' pension offers. See Bird v. Connecticut Power Co., supra, 144 Conn. at 463, 133 A.2d at 897.

In the absence of Connecticut precedent which is directly on point, the defendants urge that the Bird rule should not be applied to this case, and instead refer the court to a line of cases from other jurisdictions which

hold that public employees' pensions are "gratuities."¹¹ However, the court finds the logic of these cases to be anything but compelling. To follow these authorities would require the court to hold that a pension is a "gratuity" if offered by the state, even though the same pension would undoubtedly give rise to contractual rights under Connecticut law if it were offered by a private employer under like circumstances. In support of this distinction, the defendants rely entirely on the fact that the state, unlike a private employer, possesses attributes of sovereignty.

While Connecticut's sovereignty is undeniable, so is its ability to enter into binding contracts to procure the services which it requires to function on a daily basis. See United States

Trust Co. v. New Jersey, supra, 431 U.S. at 24, 97 S.Ct. at 1519 (a state's "power to enter into effective financial contracts cannot be questioned"). The fact that in our constitutional system, the state possesses a measure of sovereignty in no way supports the conclusion that its offer of pension benefits to its employees is gratuitous rather than contractual. See Cohn, Public Employee Retirement Plans--The Nature of the Employees' Rights, 1968 U. of Ill.L.Forum 32, 37.

Another difficulty with the notion that the pensions offered by Connecticut are "gratuities" is to be found in the state's own constitution. Article 11, section 2 of the Connecticut Constitution provides:

§2. Extra compensation to public officers prohibited

Neither the general assembly nor any county, city, borough, town or school district shall have power to pay or grant any extra compensation of any public officer employee, agent or servant or increase the compensation of any public officer or employee, to take effect during the continuance in office of any person whose salary might be increased thereby, or increase the pay or compensation of any public contractor above the amount specified in the contract.

This provision, which dates to the nineteenth century,³⁴ prohibits the legislature from bestowing "extra compensation" or gratuities on the state's employees. "[T]he purpose of the article [is] to take from the public bodies therein mentioned . . . the power to make gratuitous compensation to public officers and employees in addition to that which is established by law or contract . . ."

Sullivan v. City of Bridgeport, 81 Conn. 660, 665, 71 A. 906, 907 (1909)

(ordinance increasing police officers' salaries did not confer an unconstitutional gratuity). See also State ex rel. Marsh v. Lum, supra, 95 Conn. at 205-206, 111 A. at 192 (school board's grant of a pay increase to teachers was a contract, not a gratuity barred by the state constitution); McGovern v. Mitchell, 78 Conn. 536, 569, 63 A. 433, 446 (1906).

Through Article 11, section 2, the sovereign people of Connecticut expressly denied the legislature the power to make gratuitous payments to state employees--the very power which the defendants now misguidedly argue the legislature exercised when it passed the State Employees Retirement Act. The court declines to find that the General Assembly exceeded its constitutional authority when, in 1939,

it enacted the state's comprehensive public employee retirement laws.³⁵ Rather, the court concludes that the State Employees Retirement Act was in fact designed to achieve the proper legislative purpose of providing a form of deferred compensation to qualified state employees as an incentive for them to enter into, and remain in, state service. See Alcorn ex rel. Hyde v. Dowe, 10 Conn.Supp. 346, 350 (Super.Ct. Hartford Cty.), rev'd on other ground sub nom. State ex rel. Hyde v. Dowe, 129 Conn. 266, 28 A.2d 12 (1942) ("the fundamental theory of the Act is that those who have rendered long and faithful service to the State shall be compensated after they retire").

Because Connecticut's sovereignty does not compel a finding that the

nature of the plaintiffs' expectations differs from those of similarly situated employees in the private sector in any legally significant way, the court finds the Bird rationale applicable to the case at bar. This result is supported by the trend of cases in other states holding that, at least where employees contribute to the pension fund (as Connecticut's employees are required to do), a public pension plan is not a gratuity, but rather gives rise to binding contractual rights and obligations.³⁶ See, e.g., In re State Employees' Pension Plan, 364 A.2d 1228 (Del. 1976); Miles v. Tennessee Consolidated Retirement System, 548 S.W.2d 299 (Tenn. 1976); Pyle v. Webb, 253 Ark. 940, 489 S.W.2d 796 (1973); Sylvestre v. State, 298 Minn. 142, 214 N.W.2d 658 (1973); Smith v. City of

Dothan, 279 Ala. 571, 188 So.2d 532
(1966); Yeazell v. Copins, 98 Ariz.
109, 402 P.2d 541 (1965); Police
Pension & Relief Board v. Bills, 148
Colo. 383, 366 P.2d 581 (1961); State
Teachers' Retirement Board v. Giesel,
12 Wis.2d 5, 106 N.W.2d 301 (1960);
Eisenbacher v. City of Tacoma, 53
Wash.2d 280, 333 P.2d 642 (1958);
Wright v. Retirement Board, 390 Pa. 75,
134 A.2d 231 (1957); Wallace v. City of
Fresno, 42 Cal.2d 180, 265 P.2d 884
(1954); Tait v. Freeman, 74 S.D. 620,
57 N.W.2d 520 (1953); Payne v. Board of
Trustees, 76 N.D. 278, 35 N.W.2d 553
(1948).

The numerous courts which have
rejected the archaic notion that public
employees' pensions are merely
gratuities which may be revoked or

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significantly modified at the whim of the legislature have recognized that one who is offered a pension by the state as an inducement to join and remain in the state's employ is in precisely the same position as one, such as the plaintiff in Bird, who is offered a similar pension for the same reasons by a private employer. In both instances, the offered pension is a form of deferred compensation upon which the employee makes his or her decision to accept and continue in a job. See Wright v. Retirement Board, supra, 390 Pa. at 79, 134 A.2d at 233. In both cases, the employer and employee each give up something of value: the employer makes a promise to pay compensation in the future, and the employee forbears from accepting other employment. In both cases, each obtains something of value: the employee gains an expectation of

deferred compensation upon retirement, while the employer receives valuable services and, perhaps, a measure of loyalty from the employee. See Yeazell v. Copins, supra, 98 Ariz. at 114-15, 402 P.2d at 543.

The contractual nature of modern contributory public employee pension plans, and their similarity to private pension plans, was placed in historical perspective by the Supreme Court of Delaware in holding that the "gratuity" doctrine no longer comports with modern realities:

"Originally a pension was a gratuity usually offered to a retiring officer or executive of a company to show the company's appreciation for past services rendered. Those first pension systems were non-contributory and, although a person might have expected to receive a pension, the recipient usually did not accept employment or continue therein in reliance upon the expectation of a pension. As time and the nature of employment relationships passed, employers--even governments--found it necessary as a matter of competition to

offer a pension plan benefit as an inducement for the hire or retention of employees. Indeed, in today's economy, the terms and conditions of an employer's pension plan play an important role in inducing a man to enter or continue in the service of that employer. In other words, it is a part of the consideration for the contract of hire."

Dorsey v. State ex rel. Mulrine, 301 A.2d 516, 518 (Del. 1972) (emphasis added). See also Hickey v. Pension Board, 378 Pa. 300, 304-05, 106 A.2d 233, 235-36 (1954).

As noted at greater length previously, the facts of this case demonstrate the contractual nature of the relationship between the state and the plaintiffs. Following the trend of better-reasoned modern cases from other jurisdictions, and consistently with Connecticut contract law and the rationale of the opinion of the Connecticut Supreme Court of Errors in

Bird, the court holds that the enactment of the State Employees Retirement Act gave rise to contractual rights and obligations which are cognizable under the contract clause of the United States Constitution. In so holding, the court does not denigrate the sovereignty of the State of Connecticut. While the state's sovereignty is irrelevant to the existence of a contract, it is an important factor in determining whether any contractual obligation of the state has been unconstitutionally impaired. The court duly considers questions of state sovereignty in determining the constitutionality of the claimed impairment of Connecticut's contractual obligations.³⁷

3. The Content of the Plaintiffs'
 Contractual Rights and
 Connecticut's Obligations

[6] The content of the plaintiffs' contractual rights and Connecticut's obligations, to the extent that they are affected by the 1975 Act, merits some consideration. The state is not, of course, contractually obligated to pay any employee pension benefits until he or she meets all the qualifications established by law, including completion of the requisite period of service and attainment of the requisite age. Therefore, members of the plaintiff class lack, as of this date, vested rights to receive pension benefits. This does not mean, however, that they are without rights protected by the law of contracts and the contract clause of the United States

Constitution. Because of their reliance interest and the consideration which they have given for the state's offer of pension benefits, the plaintiffs have a contractual right to continued membership in the State Employees Retirement System under the terms for retirement ages and benefits prevailing immediately prior to the adoption of the 1975 Act. See Wright v. Retirement Board, supra, 390 Pa. at 79, 134 A.2d at 233; Police Pension & Relief Board v. Bills, supra, 148 Colo. at 390, 366 P.2d at 583 (although pension rights are only vested at the time of retirement, a "limited vesting" occurs upon commencement of employment, so that the pension plan, as it relates to those in state service, cannot be abolished or adversely affected in any substantial manner). Cf. Restatement (Second) of Contracts §45 &

Illustration 8 (Tent. Draft No. 2, 1965) (when unilateral option contract is offered, the offeree possesses a contractual right from the time he begins performance in reliance upon the offer).

[7] The substance of the state's contractual obligations, and of the plaintiffs' corresponding rights, is not to be found in the bare words of the State Employees Retirement Act as it read prior to its 1975 amendment. Rather, this court must look to the statute as it was modified by the decision in Fitzpatrick v. Bitzer. Viewing the matter otherwise would in effect undo this court's holding in Fitzpatrick, as applied to the male plaintiffs, by restoring the effectiveness of the very discriminatory provisions of state law

which violated Title VII.³⁸ As this court held in Fitzpatrick, Title VII requires that if the state obligates itself to grant women retirement rights at age 50 under certain conditions, it must grant men the same rights under the same conditions. See Fitzpatrick v. Bitzer, supra, 390 F.Supp. at 290. Because women in the plaintiff class could expect, under pre-1975 law, to retire with pensions at age 50 after 25 years of continuous state service, the court is constrained by Title VII and Fitzpatrick to hold that similarly situated males in the class had the same contractual expectations at the time the 1975 Act was adopted.

While this conclusion might at first seem to grant male plaintiffs greater rights than they had reason to expect, it is in fact consistent with

the scope of their admitted reliance interest. After this court's decision in Fitzpatrick, in which the state acquiesced, Connecticut enforced the law in accordance with Judge Clarie's decision, permitting men to retire on the terms which previously had applied only to women. As the defendants admit, males in the plaintiff class relied upon this application of the law after September 1974 in forbearing from seeking and accepting alternative employment.¹⁹ Since the male plaintiffs' contractual rights immediately prior to the 1975 Act were defined by their reliance interest, their rights were in fact, as they must be under Title VII, identical to those of the female members of the plaintiff class.

C. Connecticut's Impairment of Its
Contractual Obligations

The contract clause prohibits certain impairments by states of contractual obligations. Recent Supreme Court cases have been concerned with whether such impairments are merely "technical" in nature, United States Trust Co. v. New Jersey, supra, 431 U.S. at 21, 97 S.Ct. at 1517. "The severity of the impairment measures the height of the hurdle the state legislation must clear." Allied Structural Steel Co. v. Spannaus, supra, 438 U.S. at 245, 98 S.Ct. at 2723. The defendants have conceded that if prior law created contractual obligations on the part of the state, the 1975 Act represents an impairment of Connecticut's obligations to the plaintiffs.⁴⁰ The court finds,

moreover, that the acknowledged impairment here is not a "technical" one.

The 1975 Act requires the plaintiffs to work up to five additional years in order to obtain the benefits which the state promised them under the contract created by prior law. It reduces, as a practical matter, the retirement income which members of the plaintiff class can expect to receive, and in some instances will prevent class members from receiving pension benefits altogether. Because the 1975 Act thus operates to reduce substantially the value of the plaintiffs' contractual expectations without providing them with any compensatory benefits, it constitutes a significant impairment of the state's contractual obligations to

the plaintiffs. See e.g., In re State Employees' Pension Plan, supra, 364 A.2d at 1234-36 (Delaware statute permitting invasion of pension fund into which beneficiaries made contributions for the payment of benefits to non-contributing employees violated the contract clause of the federal Constitution); Sylvestre v. State, supra, 298 Minn. at 155, 214 N.W.2d at 666 (Minnesota statute depriving retired judges of the benefits of an "escalator" provision which tied their pensions to the salaries of active judges violated the contract clause of the United States Constitution and an analagous provision in the Minnesota Constitution); Opinion of the Justices, 364 Mass. 847, 864, 303 N.E.2d 320, 329 (1973) (proposed statute materially increasing the required contributions of state

employees to pension fund without increasing the benefits they ultimately could expect was "presumptively unconstitutional" under the contract clause). Cf. United States v. Larionoff, 431 U.S. 864, 879-82, 97 S.Ct. 2150, 2159-60, 53 L.Ed.2d 48 (1977) (statute repealing provision for reenlistment bonuses for members of Navy who agree to extend their terms of service held to apply only prospectively; retroactive application would interfere with "contractual entitlements" and create "serious constitutional questions"); Caola v. United States, 404 F.Supp. 1101, 1106-07 (D.Conn. 1975) (Blumenfeld, J.).

Because the facts of this case demonstrate an undeniable "[s]evere impairment" of contract, the court must undertake "a careful examination of the

nature and purpose of the state legislation." Allied Structural Steel Co. v. Spannaus, supra, 438 U.S. at 245, 98 S.Ct. at 2723.

D. The Unconstitutionality of Connecticut's Impairment of Its Contractual Obligations

1. The "Reserved Powers" Doctrine

[8] This examination must begin with an inquiry into the issue of whether the "reserved powers" doctrine shields the state from the contract clause challenge. As the Supreme Court has stated, a court "must attempt to reconcile the strictures of the Contract Clause with the 'essential attributes of sovereign power,' [Home Building & Loan Association v. Blaisdell, supra, 290 U.S.] at 435, [54

S.Ct. at 239,] necessarily reserved by the States to safeguard the welfare of their citizens. Id., at 434-440, [54 S.Ct. at 238-240.]" United States Trust Co. v. New Jersey, supra, 431 U.S. at 21, 97 S.Ct. at 1517.

[9] Where, as in the case at bar, a state is found to have impaired the obligation of its own contract, the "reserved powers" doctrine imposes on a court the obligation to undertake the inquiry described in United States Trust Co. v. New Jersey, supra:

"The initial inquiry concerns the ability of the State to enter into an agreement that limits its power to act in the future. As early as Fletcher v. Peck, the Court considered the argument that 'one legislature cannot abridge the powers of a succeeding legislature.' 6 Cranch, at 135. It is often stated that 'the legislature cannot bargain away the police power of a State.' Stone v. Mississippi, 101 U.S. 814, 817, [25 L.Ed. 1079] (1880). This doctrine requires a determination of the State's power to create irrevocable

contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment. In short, the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty."

431 U.S. at 23, 97 S.Ct. at 1518
(footnote omitted).

As the Court observed in United States Trust Co., earlier Supreme Court decisions divided the powers of the states into those which could not be "contracted away" (such as the police power and the power of eminent domain) and those which a state could exercise in a manner which would bind it in the future; chief among the latter were the taxing and spending powers. United States Trust Co. v. New Jersey, *supra*, 431 U.S. at 23-24 & nn. 20-21, 97 S.Ct. at 1518 & nn. 20-21. Of this historic dichotomy, Justice Blackmun wrote for the Court:

"Such formalistic distinctions perhaps cannot be dispositive, but they contain an important element of truth. Whatever the propriety of a State's binding itself to a future course of conduct in other contexts, the power to enter into effective financial contracts cannot be questioned."

431 U.S. at 24, 97 S.Ct. at 1518 (emphasis added).

[10] A purely financial obligation--such as the promise in United States Trust Co. not to deplete the revenues and reserves securing the bonds of the Port Authority, or the promise here to pay state employees retirement benefits established by state law--"may not be said automatically to fall within the reserved powers that cannot be contracted away." United States Trust Co. v. New Jersey, supra, 431 U.S. at 24-25, 97 S.Ct. at 1519. Accordingly, the 1975 Act cannot escape further judicial scrutiny under the contract

clause on the ground that the "reserved powers" doctrine prohibited Connecticut from entering into a binding contract to provide pension benefits for its employees.

2. Judicial Scrutiny Under the
 "United States Trust Co."
 Tests

[11] An exercise of the spending power which creates a contract whose enforcement is not barred by the "reserved powers" doctrine may nonetheless be modified by the state legislature in certain circumstances. While the 1975 Act enjoys no immunity from a challenge under the contract clause merely because its predecessor statutes were passed in the exercise of the legislature's power to expend money from the public treasury, it may yet

pass constitutional muster if it is
"both reasonable and necessary" to
"serve an important public purpose."
United States Trust Co. v. New Jersey,
431 U.S. at 29, 97 S.Ct. at 1521; id.
at 25, 97 S.Ct. at 1519 (emphasis
added). However, as Justice Blackmun
has noted, the application of the tests
of necessity and reasonableness
requires a much greater degree of
judicial scrutiny in cases, such as
this one, involving legislation which
purports to abrogate a state's own
financial obligation than in cases
involving an impairment by the state of
purely private contracts.⁴¹

"[C]omplete deference to a
legislative assessment of
reasonableness and necessity is not
appropriate because the State's
self-interest is at stake. A
governmental entity can always find
a use for extra money, especially
when taxes do not have to be
raised. If a State could reduce
its financial obligations whenever
it wanted to spend the money for

what it regarded as an important public purpose, the Contract Clause would provide no protection at all."

United States Trust Co. v. New Jersey,
supra, 431 U.S. at 26, 97 S.Ct. at 1519
(footnote omitted).⁴²

[12] As the legislative history of the 1975 Act demonstrates, the twin purposes of the legislation were the correction of what the legislature deemed an imprudent policy of allowing some state employees to retire with pension benefits at age 50 and the reduction of state spending. The state's decision to establish or change a policy of permitting its employees to retire with pension benefits at whatever age the legislature chooses--whether 50, 55, or a higher age--is one which the court does not question, for the wisdom of such a policy is not a proper concern of this

court. The desirability of reducing the state's financial burdens is beyond doubt. Without questioning that the state's objectives here are "important public purpose[s]" within the meaning of the test established by the Supreme Court in United States Trust Co., the court must nonetheless examine the 1975 Act to determine whether it was both "necessary" to the achievement of these policy goals and "reasonable in light of the surrounding circumstances."⁴³ See United States Trust Co. v. New Jersey, supra, 431 U.S. at 31, 97 S.Ct. at 1522. If the 1975 Act fails either of these tests, it must be held unconstitutional. The court finds that it fails both.

(a) Necessity

The inquiry into the "necessity" component of the United States Trust Co. standard "can be considered on two levels": first, whether "a less drastic modification" of contractual obligations would have been sufficient to accomplish the state's purposes, and second, whether, without modifying its obligations at all, the state "could have adopted alternative means of achieving [its] goals" United States Trust Co. v. New Jersey, supra, 431 U.S. at 29-30, 97 S.Ct. at 1521-1522. It is no answer that "choosing among these alternatives is a matter for legislative discretion," since

"a State is not completely free to consider impairing the obligations of its own contracts on a par with other policy alternatives. Similarly, a State is not free to

impose a drastic impairment when an evident and more moderate course would serve its purposes equally well."

United States Trust Co. v. New Jersey,
supra, 431 U.S. at 30-31, 97 S.Ct. at
1522.

The General Assembly clearly could have accomplished the first goal of the 1975 Act--correcting what it believed to be an unsound policy of permitting some state employees to retire with pensions as early as their 50th birthdays--without impairing any of the state's contractual obligations.⁴⁴ Having originally determined that retirement with pension benefits at age 50 is, in some circumstances, appropriate, the legislature is certainly entitled to reconsider its judgment and raise the retirement age to 55 or any other age it deems

appropriate.⁴⁵ However, the state could have attained this goal without affecting the contractual rights of the plaintiffs; indeed, to the extent that the 1975 Act applies prospectively--i.e., to those who were not in state service as of its effective date--the legislature has accomplished this purpose without injuring contractual rights. The "evident and more moderate course," United States Trust Co. v. New Jersey, supra, 431 U.S. at 31, 97 S.Ct. at 1522, of a purely prospective change in the retirement ages serves Connecticut's unquestioned interest in establishing what its legislature considers a more reasonable scheme of retirement ages equally well and without impairing the obligations of its contracts.

The second purpose of the 1975 Act--saving money--could likewise have been accomplished without affecting the contractual rights and obligations created by the State Employees Retirement Act, as modified by Fitzpatrick and as in force at the time the legislature passed the 1975 Act. The General Assembly is of course free to choose among legislative options which would have the laudatory effect of reducing the burdens borne by Connecticut's taxpayers. However, nothing in the record indicates that it was impossible for the legislature to reduce state spending without abrogating the state's contract with the plaintiffs. Indeed, common sense suggests the existence of other options; the legislature must have had available to it myriad alternative ways of exercising fiscal restraint without

affecting constitutionally protected rights.

This is not a case where the legislature found itself confronted by a dire fiscal emergency which impaled the state on the horns of the dilemma of either repudiating its contractual obligations or ceasing to perform such basic governmental functions as protecting its citizens' health, safety and welfare. This case is thus readily distinguishable from Ropico, Inc. v. City of New York, 425 F.Supp. 970 (S.D.N.Y. 1976) and Subway-Surface Supervisors Association v. New York City Transit Authority, 44 N.Y.2d. 101, 404 N.Y.S.2d 323, 375 N.E.2d 384 (1978), two important New York cases which recently upheld state legislation challenged under the contract clause.

In Ropico, which was decided before the Supreme Court's decision in United States Trust Co., the court upheld against a contract clause challenge state legislation which suspended for a three-year period repayment of the principal on certain short-term notes issued by the City of New York, but which permitted the affected noteholders either to exchange their notes for the longer-term obligations of a special state agency (the Municipal Assistance Corporation) or to obtain interest on their notes until the principal was repaid.⁴⁶ In Subway-Surface Supervisors Association, the court held that the contract clause did not prohibit a temporary freeze on the wages of New York City employees as part of another statute designed to alleviate the city's fiscal emergency.

The statutes under challenge in Ropico and Subway-Surface Supervisors Association were both passed by the New York Legislature, in extraordinary sessions, on the basis of detailed legislative findings of fact which spelled out the conditions that constituted a grave emergency, threatening the city's very existence as a viable governmental entity.^{4 7}

In both Ropico and Subway-Surface Supervisors Association, the legislation under attack was necessary to prevent an unparalleled financial crisis from, in the words of the Legislature, "almost permanently destroy[ing] the fiber of the city."^{4 8} Connecticut was not backed into any such corner in 1975;^{4 9} the General Assembly which passed the legislation under attack in this action was not forced to choose between

abrogating its contractual commitments or permitting the state to become insolvent, and thereby unable to continue to function as a viable governmental entity.

Accordingly, the court finds that the retroactive application of the 1975 Act to the plaintiffs cannot be justified, under the United States Trust Co. test, as an impairment of contractual obligations which was necessary to achieve the state's concededly legitimate and important purposes.

(b) Reasonableness

As applied to the plaintiff class, the 1975 Act is not "reasonable in light of the surrounding circumstances," as required by United

States Trust Co. v. New Jersey, supra,
431 U.S. at 31, 97 S.Ct. at 1522.⁵⁰

The Court there rejected New Jersey's argument that unforeseen changes occurring after the adoption of a 1962 bondholders' covenant justified as "reasonable" 1974 legislation which repealed the 1962 covenant and impaired the contractual obligations established by that covenant. In doing so, the Court indicated that unforeseen subsequent circumstances might, in an appropriate case, be sufficient to demonstrate that a law impairing pre-existing contractual obligations was "reasonable in light of the surrounding circumstances." Referring to El Paso v. Simmons, supra, the Court wrote:

"There a 19th century statute had effects that were unforeseen and unintended by the legislature when originally adopted. As a result speculators were placed in a

position to obtain windfall benefits. The Court held that adoption of a statute of limitation [for the reinstatement rights of purchasers of state land who had defaulted on their interest obligations] was a reasonable means to 'restrict a party to those gains reasonably to be expected from the contract' when it was adopted. 379 U.S., at 515, 85 S.Ct. at 587."

United States Trust Co. v. New Jersey,
supra, 431 U.S. at 31, 97 S.Ct. at 1522
(footnote omitted).

The application to this case of the concept of unforeseen circumstances giving rise to unintended "windfalls" (as in El Paso), on the basis of this court's decision in Fitzpatrick, is troublesome. The pension benefits granted to female employees after Fitzpatrick cannot be deemed unforeseeable "windfalls," because Judge Clarie's decision did not change the terms of their entitlement to such benefits. However, it is arguable⁵¹

that this characterization is applicable to the benefits which the state was required to pay male employees as a result of Fitzpatrick. Thus, the defendants might have attempted to justify the 1975 Act as a "reasonable" attempt to "'restrict [male members of the plaintiff class] to those gains reasonably to be expected from the contract' when it was adopted," United States Trust Co., supra, 431 U.S. at 31, 97 S.Ct. at 1522, quoting El Paso v. Simmons, supra, 379 U.S. at 515, 85 S.Ct. at 587, and to prevent male plaintiffs from reaping "windfalls." However, such a construction would require the court to uphold the 1975 Act in its effect on males in the plaintiff class (including men who were also members of the plaintiff class in Fitzpatrick v. Bitzer) but invalidate it as it applies

to female plaintiffs. A holding that the contract clause permits the impairment of Connecticut's obligations to men, but not women, in the plaintiff class would, of course, permit the state to treat male plaintiffs in the discriminatory manner which Judge Clarie found unlawful under Title VII. Such disparate treatment of men and women, explicitly forbidden by this court's enforcement of Title VII in Fitzpatrick, could not possibly be regarded as "reasonable in light of the surrounding circumstances."

Moreover, factors other than "unforeseen circumstances" which have been deemed relevant to the "reasonableness" inquiry militate against a finding that the 1975 Act was reasonable as applied to the plaintiffs. The effect of the 1975 Act

on the plaintiffs would not be "simply a temporary alteration of the contractual relationships" in question, Allied Structural Steel Co. v.

Spannaus, supra, 438 U.S. at 250, 98 S.Ct. at 2726. Rather, it would work "a severe, permanent, and immediate change in those relationships--irrevocably and retroactively." Id. Nor does the scope of the 1975 Act, as it applies to persons in the state's employ as of its effective date, appear reasonable. The statute does not apply equally to all who were then in state service; instead, it singles out those who would not reach the age for normal retirement within the next five years. The defendants have offered no justification or explanation for the decision to "grandfather in" some state employees, while leaving the plaintiffs

subject to the new eligibility requirements for pension benefits. Cf. Allied Structural Steel Co. v. Spannaus, supra, 438 U.S. at 250, 98 S.Ct. at 2725.

Accordingly, the court cannot conclude that the 1975 Act, as applied to the plaintiffs, was a reasonable method of furthering the state's interests.

V. CONCLUSION

On the basis of the admitted and stipulated facts, the court finds that Connecticut and the members of the plaintiff class were parties to a valid and binding contract. Immediately prior to the time the 1975 Act became law, this contract required the state to permit both male and female members

of that class to retire on the terms of the State Employees Retirement Act which, before this court's decision in Fitzpatrick, had applied only to female employees. The court finds that the 1975 Act severely impairs the obligations of this contract. Indeed, although they have claimed that the plaintiffs have no contractual rights, the defendants have conceded that if any such rights existed, the 1975 Act impaired the state's contractual obligations to the plaintiffs. That impairment cannot be justified, under the tests set forth by the Supreme Court in United States Trust Co., as either "necessary" to "serve an important public purpose" or "reasonable in light of the surrounding circumstances." The 1975 Act, as applied to the plaintiffs, thus

unconstitutionally impaired the state's contractual obligations.

This conclusion in no way affects the constitutionality of the 1975 Act insofar as it applies to employees who entered state service after June 30, 1975. Nor does it prevent the members of the legislature, as the duly elected representatives of the people of Connecticut, from enacting in the future any legislation on the subject of state employees' pensions which comports with their considered judgment and wisdom on matters of public policy and does not interfere with rights protected by the Constitution or laws of the United States. In his opinion in Fitzpatrick, Judge Clarie expressly stated:

"Nothing herein shall be construed to interfere with the State Legislature performing its

constitutional function of freely determining public policy, as it pertains to deciding upon a uniform retirement age for all men and women employees of the State of Connecticut in the future, provid[ing] the same is carried out without discrimination as to age or benefits on the basis of sex."

Fitzpatrick v. Bitzer, supra, 390

F.Supp. at 290 (emphasis added). To those words this court today only adds the proviso, which inheres in our constitutional system, that such legislation as the state may enact on this subject may not transgress the limitations on state power, such as the contract clause, which are embodied in the United States Constitution.

The plaintiffs' motion for summary judgment is granted. A permanent injunction shall issue, requiring the defendants to administer the State Employees Retirement Act in a manner which respects the plaintiffs'

contractual rights. The parties shall settle within ten days an order consistent with this memorandum of decision, ensuring that the State Employees Retirement Act is administered in a way which protects the contractual rights of every member of the plaintiff class, and curing each of the various types of injury which the 1975 Act works upon their constitutionally protected expectations. The order shall further provide for notice of this decision to be sent to all members of the plaintiff class and shall include a proposed form of notice to the class.

It is so ordered.

FOOTNOTES

¹ 390 F.Supp. 278 (D.Conn. 1974), aff'd in part and rev'd in part on grounds not relevant here, 519 F.2d 559 (2d Cir. 1975), aff'd in part and rev'd in part on grounds not relevant here, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

² 42 U.S.C. Section 2000e et seq.

³ The appeal in Fitzpatrick (see n.1 supra) was taken by the plaintiffs and involved only the question whether the Eleventh Amendment to the United States Constitution barred recovery by them of monetary damages and attorney's fees. The Supreme Court ultimately held that Connecticut's immunity under the Eleventh Amendment was no obstacle to either form of relief. There was no appeal from Judge Clarie's holding in Fitzpatrick that the Connecticut statute violated the rights of male employees under the Title VII, or from the injunction which he issued against the state officials named as defendants in Fitzpatrick. See Fitzpatrick v. Bitzer, supra, 427 U.S. at 450n.7, 96 S.Ct. at 2668 n.7.

⁴ Stipulation Concerning Facts, filed March 26, 1980 §2.

⁵ U.S.Const. art 1, §10, cl. 1.

⁶ Brief in Opposition to Plaintiffs' Motion for Summary Judgment, P. 4. quoting Beford v. White, 106 Colo, 439, 444, 106 P.2d 469, 472 (1940). The quoted language has

long since been repudiated by the Supreme Court of Colorado. See Pension & Relief Board v. Bills, 148 Colo. 383, 388-89, 366 P.2d 581, 583-84 (1961); note 33, infra.

7 See p. 529, infra.

8 The class members were duly notified of the pendency of this action and of their rights with respect to the litigation by means of notices distributed with payroll checks to state employees on April 20, 1979. Affidavit of Sidney D. Giber, Assistant Attorney General of the State of Connecticut, filed October 29, 1979.

9 Under the law in force immediately prior to the effective date of the 1975 Act, the normal retirement ages were 50 for employees with 25 years of continuous state service and 55 for employees with at least 10, but less than 25, years of continuous state service. The 1975 Act raised the normal retirement ages to 55 and 60, respectively, Conn.Gen.Stat. §§5-162(c), 5-162(d), except for employees who would reach, prior to June 30, 1980, the normal retirement ages previously in force. Conn.Gen.Stat. §5-163a.

10 The Treasurer's duties include the receipt and disbursement of public monies, Conn. Const. art. 4, §22, including monies in the State Employees Retirement Fund, Conn.Gen.Stat. §5-156.

11 The Comptroller is responsible for the adjustment and settlement of public accounts, Conn. Const. art. 4, §24, including accounts for the state's pension systems, see Conn.Gen.Stat. §§5-156(b), 5-159.

12 Excepted are elected officials and their appointees (who may nonetheless choose to join the system), Conn.Gen.Stat. §5-160(b), judges (who may, in the special circumstances enumerated in Conn.Gen.Stat. §5-166a, choose to join the system, rather than a special retirement system for the judiciary), Conn.Gen.Stat. §5-160(c), and teachers in state service, Conn.Gen.Stat. §5-160(g). The latter must join either the State Employees Retirement System or a separate retirement system for teachers. Id.; Conn.Gen.Stat. §5-158f.

13 Memorandum from JoAnn S. Mogensen, Chief of the Retirement Division of the Office of the Comptroller, State of Connecticut, to Sidney D. Giber, Assistant Attorney General of the State of Connecticut, March 10, 1980, p. 1 (hereafter referred to as the "Mogensen Memorandum"), annexed as an exhibit to the Stipulation Concerning Facts, filed March 26, 1980.

14 Mogensen Memorandum, p. 2. If the accrued interest were not credited to employees' contributions, the range would be from 6.9% to 12.8% of benefits. Id.

15

The absence of a genuine issue of material fact is, of course, a prerequisite to the availability of summary judgment under Rule 56, Fed.R.Civ.P. Although the parties admitted and stipulated to a fairly complicated set of facts, the court would have been greatly assisted had the parties prepared and filed the statements required by Rule 9(d) of the Local Rules Governing Civil Procedure in this District. That rule requires the party moving for summary judgment to include in his moving papers "a separate, short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried," and requires the opposing party to file "a separate, short and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried." Because Rule 9(d) statements facilitate the determination whether summary judgment is an appropriate remedy, compliance with the rule is mandatory.

16

This provision also permitted female employees with at least five but less than ten years of state service to retire with pension benefits at age 65; no male employee could retire with less than ten years of state service under this provision, regardless of his age. See former Conn.Gen.Stat. §5-162(d)(1)(A).

17

The 1972 amendment, Pub.L. No. 92-261, §2, brought state employees within the protection of Title VII's prohibition of sex discrimination in employment. Fitzpatrick v. Bitzer, supra, 427 U.S. at 449 n.2, 96 S.Ct. at 2668 n.2. In view of his decision under the federal statute, it was unnecessary for Judge Clarie to consider the plaintiffs' claim that the Connecticut statute also violated the equal protection clause of the Fourteenth Amendment to United States Constitution. Fitzpatrick v. Bitzer, supra, 390 F. Supp. at 290; id. 427 U.S. at 449 n.3, 96 S.Ct. at 2668 n.3.

18

See n.3, supra. The Supreme Court's decision in Fitzpatrick held that the retired members of the plaintiff class were entitled to "an award of retroactive retirement benefits as compensation for losses caused by the State's discrimination," Fitzpatrick v. Bitzer, supra, 427 U.S. at 449-56, 96 S.Ct. at 2667, as well as reasonable attorney's fees, id. at 456-57, 96 S.Ct. at 2671. As a result of this holding, the retired plaintiffs in Fitzpatrick received compensatory payments for the period commencing March 24, 1972 (the effective date of the 1972 amendments to Title VII), which left them with benefits identical to what they would have received had they been permitted to retire at the ages formerly applicable only to women. Mogensen Memorandum, p. 1.

1 9 Stipulation Concerning Facts,
filed March 26, 1980, ¶2.

2 0 The facts recounted in this
section of the court's opinion
were established by the
defendants' failure to respond to
the plaintiffs' Request for
Admissions, filed July 13, 1979.
Under Rule 36(a), Fed.R.Civ.P.,
the failure of a party served with
such a request to respond within
thirty days of service constitutes
an admission of the matters
requested. According to Rule
36(b), Fed.R.Civ.P., "[a]ny matter
admitted under this rule is
conclusively established unless
the court on motion permits
withdrawal or amendment of the
admission." Counsel for the
defendants has not moved to
withdraw or amend the admissions.
Nor have the defendants attempted
to file a response, however
untimely, to the plaintiffs'
Request for Admissions.
Accordingly, the court deems these
facts admitted and conclusively
established for the purposes of
this litigation.

2 1 See Answer ¶4, admitting relevant
portions of Amended Complaint ¶14.

2 2 Conn.Gen.Stat. §5-163a.

2 3 Section 5-163(c), which is headed
"[e]arly retirement," provides
that an employee, not covered by
Conn.Gen.Stat. §5-163a, "whose
state service is terminated
because of economy, lack of work

or abolition of his position, or who, being an army or air national guard technician in the military department, is dismissed by reason of separation from the national guard because of age, after he has completed twenty-five years of state service, but before he has reached his fifty-fifth birthday, shall be entitled to a retirement income."

2 4 Section 5-166 applies to employees who leave state service before they become eligible for retirement, "but after completing at least ten years of state service, of which at least five years shall have immediately preceded the date of . . . leaving state service," unless they are covered by Conn.Gen.Stat. §5-163a. Conn.Gen.Stat. §5-166(a).

2 5 The facts relating to the named plaintiffs are drawn from ¶¶15-21 of the plaintiffs' Amended Complaint, which are admitted in ¶3 of the defendants' Answer.

2 6 The plaintiffs also allege that the 1975 Act violates their rights under the due process and equal protection clauses of the Fourteenth Amendment. However, these points were neither emphasized in the parties' briefs nor stressed at oral argument. See Transcript of Oral Argument on Plaintiffs' Motion for Summary Judgment, Feb. 7, 1980, p. 4. In view of the court's conclusion that the plaintiffs' rights under

the contract clause were violated by the 1975 Act, it is unnecessary to consider the merits of the Fourteenth Amendment claims which the plaintiffs have not pressed.

27

In El Paso, the Court upheld a Texas statute which limited the reinstatement rights of those who had purchased land from the state and had defaulted on their interest payments by requiring that such persons make application for reinstatement within five years of default; prior law included no such statute of limitations. Rejecting the argument that the contract clause forbade such legislation, the Court held that "it is not every modification of a contractual promise that impairs the obligation of contract under federal law" El Paso v. Simmons, *supra*, 379 U.S. at 506-07, 85 S.Ct. at 582.

In Blaisdell, the Supreme Court upheld against a contract clause challenge a temporary mortgage moratorium enacted by the Minnesota legislature in the depths of the Great Depression. The Court gave effect to the "principle of harmonizing the constitutional prohibition with the necessary residuum of state power," 290 U.S. at 435, 54 S.Ct. at 239, to deal with a grave economic crisis by holding that, in the circumstances presented, the limited impairment of contractual obligations caused by the mortgage moratorium was

constitutionally permissible.

28

In another context, the Supreme Court of the United States recently made a similar observation:

"A pension plan assures employees that by devoting a large portion of their working years to a single employer, they will achieve some financial security in their years of retirement. By rewarding lengthy service, a plan may reduce employee turnover and training costs and help an employer secure the benefits of a stable work force."

Alabama Power Co. v. Davis, 431 U.S. 581, 594, 97 St.Ct. 2002, 2009, 52 L. Ed.2d 595 (1977) (holding that the Military Selective Service Act of 1967 required an employer to grant a veteran returning from military service credit toward his pension for time spent in the military).

29

As the court noted in Borden v. Skinner Chuck Co., supra, 21 Conn. Supp. at 190, 150 A.2d at 610, this principle was applied in Connecticut as early as Tilbert v. Eagle Lock Co., 116 Conn. 357, 361-62, 165 A. 205, 207 (1933), a case involving employee death benefits. In Tilbert, a widow brought an action to recover benefits under a "certificate of benefit" issued to her late husband by his employer. The Supreme Court of Errors held that

the plaintiff stated a good cause of action under Connecticut's law of contracts, even though the employer, in a contemporaneous document explaining its offer of the "certificate of benefit," expressly stated that "[t]his benefit plan being voluntary on the part of Eagle Lock Co., it is understood that it constituted no contract with any Employee or any beneficiary, and confers no legal rights on him or them," 116 Conn. at 360, 165 A. at 207. The court found that there was consideration for the supposedly gratuitous offer of a death benefit, explaining:

"[A] prime purpose of the granting of the benefits was to secure the good will, loyalty, and efficiency of the defendant's employees and especially, through the progressive premium placed on long-continued service, to minimize labor turn-over and obtain the advantages of experienced operatives. The attainment of these purposes constituted a benefit or advantage received by the defendant, who must be assumed to have requested it because it desired it and regarded it as beneficial to its interests. Tilbert remained in the employ of the defendant more than seven years after receiving the certificate. By so doing he manifested his acceptance of the promise, forbore his right to terminate

his employment and engage elsewhere, and conferred the benefit which the defendant sought. . . . The essentials of a consideration are satisfied. . . ."

116 Conn. at 361-62, 165 A. at 207 (citations omitted).

10

Section 90 of the Second Restatement provides, in pertinent part:

§90. Promise Reasonably Inducing Action or Forebearance
A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise. .

Section 45 of the Second Restatement protects the reliance interest of promisees under certain circumstances by providing that "[w]here an offeror invites an offeree to accept by rendering a performance" only, an enforceable option contract is created upon the beginning of the promisee's performance.

11

An employee's contributions, together with the interest accrued on them, account for up to one quarter of the benefits paid to employees. See p. 530 & n.14, supra.

12

The defendants' alternative argument is that the legislature's enactment in 1975 of a collective

bargaining law for state employees, Conn.Gen.Stat. §5-270 et seq., somehow negates the existence of any contracts with state employees prior to October 1, 1975, its effective date. See Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 1-3. While the collective bargaining law provides for a type of contract between the state and its employees, it does not purport to act retroactively and turn all of the state's contracts with employees, previously made, into something less than contracts. The court therefore sees no connection between the collective bargaining legislation of 1975 and the issue of whether previous legislation gave rise to contractual obligations.

11

See Brief in Opposition to Plaintiffs' Motion for Summary Judgment, pp. 3-5. Cf. Pennie v. Reis, 132 U.S. 464, 471, 10 S.Ct. 149, 151, 33 L.Ed. 426 (1889) (interest of police officer in employee benefit fund was "a mere expectancy, created by the law, and [is] liable to be revoked or destroyed by the same authority" until the happening of the conditions established by law). Among the cases upon which the defendants rely for the proposition that public employees' pensions are mere gratuities, conferring no contractual rights, is Board of Trustees v. People ex rel. Behrman, 119 Colo. 301, 203 P.2d. 490, (1949). Behrman, was, however, expressly overruled on this point in Police Pension &

Relief Board v. McPhail, 139 Colo. 330, 344, 338 P.2d 694, 701 (1959).

For more than twenty years, Colorado courts have thus held that public employees' pension expectations are contractual in nature. See also Police Pension & Relief Board v. Bills, 148 Colo. 383, 388-89, 366 P.2d 581, 583-84 (1961).

Among the other cases containing classic statements of the "gratuity" theory of public employees' pension benefits, and relied upon by the defendants, are Dodge v. Board of Education, 302 U.S. 74, 80-81, 58 S.Ct. 98, 101, 82 L.Ed. 57 (1937) (Illinois law) and MacLeod v. Fernandez, 101 F.2d 20, 23-26 (1st Cir. 1938), cert. denied, 308 U.S. 561, 60 S.Ct. 72, 84 L.Ed. 471 (1939) (Puerto Rico law). It should be noted that by constitutional amendment, Ill. Const. art. 13, §5, adopted in 1970, Illinois declared the pension rights of public employees to be contractual, while Puerto Rico cases decided since MacLeod cast some doubt on its continued vitality in that jurisdiction. See Maldonado v. Superior Court, 100 P.R.R. 369 (1972); Lopez v. Munoz, 80 P.R.R. 4, 10 n.6 (1957); Treasurer v. Tax Court, 73 P.R.R. 830 (1952).

14

Article 11, section 2 of the Constitution of 1965 is, with the exception of two deleted commas, identical to Article XXIV of the Amendments to the Constitution of 1818, adopted in 1877.

In Yeazell v. Copins, 98 Ariz. 109, 112, 402 P.2d 541, 543 (1965), the court held that Arizona's statutory provisions for public employees' pensions were contractual in nature. The court rejected the argument that the pension benefits were gratuities, in part because the Arizona legislature, like Connecticut's, was constitutionally forbidden from conferring gratuities on state employees.

As long ago as 1956, a commentator who surveyed this field of law observed that "the tendency today is to consider a pension plan a contract," and to reject "the gratuity theory of pensions." Note, Contractual Aspects of Pension Plan Modification, 56 Colum.L.Rev. 251, 255 (1956). In addition to the states whose courts have rejected the "gratuity" concept, several states, of which New York was the first, have adopted constitutional provisions declaring public employees' pensions benefits to be contractual in nature. See N.Y. Const. art. V, §7, ("membership in any pension or retirement system of the state or a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired"); Alaska Const. art XII, §7; Hawaii Const.

art. XIV, §2; Ill. Const. art. 13, §5; Mich. Const. art. IX, §24. In Massachusetts, a statute establishes as contractual the relationship between the state and members of its public employees' retirement system. Mass. Gen.L. ch. 32, §25(5). The fact that, in other jurisdictions, prior case law based on the "gratuity" theory has been overruled by constitutional amendments or statutes is no impediment to this court's determination that Connecticut's common law of contracts requires a rejection of the "gratuity" theory. The inherent but unexercised power of a legislature or constitutional convention to discard an outmoded judge-made doctrine is no obstacle to a judicial decision that overrules such a doctrine, see generally B. Cardozo, The Nature of the Judicial Process 127-28, 134-38, 149-58 (1921), much less a bar to a decision--such as this one--which restates and interprets, rather than revises, the state's common law.

37 See pp. 547-548, infra.

38 In view of the clear holding in Fitzpatrick that the provisions of state law applicable to men violated Title VII, those provisions must, under the supremacy clause of the United States Constitution, yield to the requirements of the federal statute. See Stryker v. Register Publishing Co., 423 F.Supp. 476, 479 (D. Conn. 1976) (Newman, J.).

3 9 See pp. 532-533 & N. 20, supra.

4 0 At oral argument on the pending motion, the court asked defendants' counsel whether, assuming arguendo the existence of a contractual obligation, the 1975 Act impaired the state's obligation to its employees. Counsel responded:

 "Yes, I think I would have to concede that asking a particular state employee to work five years more would be an impairment of the contract."

Transcript of Oral Argument on Plaintiffs' Motion for Summary Judgment, Feb. 7, 1980, p. 37.

4 1 The dual standard of judicial scrutiny employed by the Court was suggested in Note, The Constitutionality of the New York Municipal Wage Freeze and Debt Moratorium: Resurrection of the Contract Clause, 125 U.Pa.L.Rev. 167, 184-91 (1976); see United States Trust Co. v. New Jersey, supra, 431 U.S. at 26 n.25, 97 S.Ct. at 1519 n.25. Several commentators have expressed the view that this dual standard breathes new life into the contract clause, at least in cases involving contracts to which states or their subdivisions are parties. See, e.g., Note, The Contract Clause: Is There Life After Death?, 30 Baylor L.Rev. 191 (1978); Comment, Constitutional Law: Contract Clause Protection of Municipal Bond Obligations, 29 U.Fla.L.Rev. 1000, 1010 (1977). While, as a general proposition,

this may be accurate, the point should not be overstated. Even in the immediate aftermath of Home Building & Loan Association v. Blaisdell, supra--the case which is often considered to have signaled the demise of the contract clause--the Supreme Court voided state laws which unreasonably and unnecessarily impaired contractual obligations. See, e.g., W.B. Worthen Co. v. Kavanaugh, 295 U.S. 56, 60-63, 55 S.Ct. 55, 555, 556-558, 79 L.Ed. 1298 (1935); W.B. Worthen Co. v. Thomas, 292 U.S. 426, 432-34, 54 S.Ct. 816, 518-519, 78 L.Ed. 1344 (1934). See generally B. Wright, The Contract Clause of the Constitution 111-19 (1938).

42

Justice Blackmun's observation that "[a] governmental entity can always find a use for extra money, especially when taxes do not have to be raised," 431 U.S. at 26, 97 S.Ct. at 1519, is strikingly reminiscent of the remarks of the sponsor of the amended bill which became the 1975 Act: "I'm sure this House will be able to find a place to use [the] three to five million dollars [to be saved] should this amendment pass." General Assembly Proceedings 1975: House of Representatives 6346 (remarks of Rep. Wright). The Supreme Court's own straightforward explanation of the need for closer scrutiny where the state has impaired its own contractual obligations is thus borne out by the record before the court in this case. Clearly, the

rationale for careful examination of the legislature's action in a case such as this has nothing to do with the existence or intimation of "legislative venality or corruption," as one commentator has suggested. See The Supreme Court, 1976 Term, 91 Harv.L.Rev. 70, 89 (1977).

4 3

Because this court does not review the merits or wisdom of the state's decisions on matters of public policy in determining the constitutionality of the statute, it cannot fairly be said that the application of the United States Trust Co. tests revives "the heyday of economic due process associated with Lochner v. New York, 198 U.S. 45, [25 S.Ct. 539, 49 L.Ed. 937] (1905), and similar cases long since discarded," United States Trust Co. v. New Jersey, supra, 431 U.S. at 60-61, 97 S.Ct. at 1537 (Brennan, J., dissenting). Lochner and similar decisions were based on the premise, no longer tenable in modern constitutional jurisprudence, that the Constitution forbids the enactment of any legislation designed to achieve certain goals. For example, in Lochner, the Court held that it was not within a state's power to regulate the hours a baker might be required to work, on the ground that the due process clause made this an impermissible purpose of state legislation. See generally L. Tribe, American Constitutional Law

§8-4 (1978). However, the contract clause analysis undertaken here does not prohibit the state from exercising its sovereignty to achieve any particular goal. The inquiry which the court undertakes is only an examination of the necessity and reasonableness of the means chosen to achieve concededly proper, and indeed important, legislative ends. The court does not in any way second-guess the legality or desirability of the purposes which the General Assembly sought, as a matter of public policy, to advance in adopting the 1975 Act.

4 4

In fact, some of the provisions of the 1975 Act have no effect on the former policy of permitting retirement with benefits at age 50. See, e.g., Conn.Gen.Stat. §5-162(d)(1) (raising age from 55 to 60 for certain employees). The impairment of contractual obligations which result from the application of those provisions to members of the plaintiff class is wholly unrelated to the goal of putting an end to retirements at age 50. Such sections of the statute can be upheld, if at all, only on the theory that they were necessary and reasonable means of achieving the state's goal of saving money.

4 5

Clearly, no provision of the United States Constitution or of federal law requires Connecticut to allow its employees to retire

with pension benefits at age 50 or, for that matter, any other age. This court's decision in Fitzpatrick v. Bitzer held only that the state, having already granted certain females in its employ the right to retire with benefits at age 50, was required by Title VII to give similarly situated males the identical right. Nothing in Fitzpatrick, see 390 F.Supp. at 290, and indeed nothing in this opinion, limits the legislature's discretion to change retirement age on a prospective and non-discriminatory basis in accordance with its policy judgments. Because it was Connecticut's own legislative decision that permitted retirement at age 50, and conferred contractual rights to retire at that age upon some employees, the state cannot complain that it is onerous to be held to that contract or its consequences. Any resulting injury is self-inflicted.

46

In Flushing National Bank v. Municipal Assistance Corp., 40 N.Y.2d 731, 390 N.Y.S.2d 22, 358 N.E.2d 848 (1976) (Breitel, C.J.), the New York Court of Appeals held that the debt moratorium statute which was also the subject of the Ropico litigation violated article VIII, section 2 of the New York Constitution, which prohibits any city in the state from contracting any indebtedness without pledging its "full faith and credit" for repaying the debt. Although the lower courts in Flushing National

Bank had held that the statute violated neither the state constitution nor the contract clause of the United States Constitution, the Court of Appeals, New York's highest tribunal, found it unnecessary to reach the federal constitutional question in light of its holding under the New York Constitution. Flushing National Bank v. Municipal Assistance Corp., *supra*, 40 N.Y.2d at 739, 390 N.Y.S.2d at 28, 358 N.E.2d at 854.

47

the preamble to the New York State Financial Emergency Act for the City of New York, 1975 N.Y. Laws, ch. 868, §1, enacted in September 1975 and challenged in Subway-Surface Supervisors Association, provides in part:

"It is hereby found and declared that a financial emergency and an emergency period exists in the City of New York. The city is unable to obtain the funds needed by the city to continue to provide essential services to its inhabitants or to meet its obligations to the holders of outstanding securities.

Unless such funds are obtained the city will soon (i) fail to pay salaries and wages to employees and amounts owed vendors and suppliers to the city, (ii) fail to pay amounts due to persons receiving assistance from the city and (iii) default on the interest and principal payments due the

holders of outstanding obligations of the city.

If such failures and defaults were to occur, the effect on the city and its inhabitants would be devastating: (1) unpaid employees might refuse to work; (2) unpaid vendors and suppliers might refuse to sell their goods and render services to the city; (3) unpaid recipients of public assistance would be unable to provide themselves with the basic necessities of life; and (4) unpaid holders of city obligations would seek judicial enforcement of their legal rights as to city revenues. These events would effectively force the city to stop operating as a viable governmental entity and create a clear and present danger to the health, safety and welfare of its inhabitants.

The difficulties of finding solutions to such events would be compounded by the likelihood that the city, as well as the municipal assistance corporation for the city of New York, would be foreclosed from seeking funds in the public markets. The elimination of the public markets as a source of funds would leave the city with no foreseeable way to refund its outstanding short-term indebtedness. Thus the city

might be unable for an extended period to cure default on its outstanding obligations and that event could almost permanently destroy the fiber of the city.

* * *

This situation is a disaster and creates a state of emergency. To end this disaster, to bring the emergency under control and to respond to the overriding state concern described above, the state must undertake an extraordinary exercise of its police and emergency powers under the state constitution, and exercise controls and supervision over the financial affairs of the city of New York, but in a manner intended to preserve the ability of city officials to determine programs and expenditure priorities within available financial resources."

* * *

(emphasis added).

In November 1975, the New York Legislature, at another extraordinary session, adopted the legislation that was attacked in Ropico, the New York State Emergency Moratorium Act for the City of New York. This statute included a preamble, 1975 N.Y. Laws, ch. 874, §1, expressing a legislative finding that the city's fiscal emergency had seriously deteriorated since the previous special legislative session:

"It is hereby found and declared that the grave public emergency found and declared to exist by the legislature in adopting the New York State Financial Emergency Act for the City of New York has dramatically worsened in the last two months. Today, not only is the City of New York threatened with default on its outstanding obligations, but financially sound agencies of the state itself are similarly threatened because of public fears about the effects of default by the city."

4 8 New York State Financial Emergency Act for the City of New York, 1975 N.Y. Laws, ch. 868, §1.

4 9 In the course of the brief debates which preceded the adoption of the 1975 Act by the General Assembly, several legislators alluded to New York City's fiscal crises, arguing that unless Connecticut began to exercise fiscal restraint in administering its pension system, it might subsequently find itself in the dire straits into which New York City had already fallen. See, e.g., General Assembly Proceedings 1975: House of Representatives 6348 (remarks of Rep. Dice); id. at 6351 (remarks of Rep. Nevas). Such occasional invocations of New York City's grave difficulties were apparently designed to sound an alarm for the future, rather than to describe the financial condition of Connecticut in 1975. Nothing in the record of the General Assembly

proceedings relating to the 1975 Act suggests that the financial problems of this state were in any sense comparable to the New York City fiscal crisis, or that the legislation enacted by the General Assembly was part of a comprehensive program to remedy or prevent any such crisis in Connecticut. It is noteworthy in this regard that the 1975 Act was not accompanied by legislative findings of imminent financial catastrophe, such as those reproduced in note 47, supra. See also Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 420-21, 421 n.3, 444-45, 54 S.Ct. 231, 233 n.3, 242, 78 L.Ed. 413 (1934) (crediting, and relying upon, express findings of legislature concerning economic emergency). Significant, too, is the fact that the defendants have not argued that the present condition of Connecticut's finances militates against a judgment for the plaintiffs. Indeed, the defendant state officials have not called to the court's attention any facts concerning the impact on the state's finances of a decision upholding the plaintiffs' challenge to the application of the 1975 Act to them.

50

The "reasonableness" test may well be, as one critic of United States Trust Co. has written, "redundant" in light of the apparently more searching inquiry, also contemplated by United States

Trust Co., into the necessity of the impairment of contractual obligations. See The Supreme Court, 1976 Term, 91 Harv.L.Rev. 70, 87 (1977); see also United States Trust Co. v. New Jersey, supra, 431 U.S. at 55 n.17, 97 S.Ct. at 1534 n.17 (Brennan, J., dissenting). The court, however, declines to ignore this test, recently set forth by the Supreme Court, even though its determination that the 1975 Act does not meet the stringent "necessity" test may technically relieve the court of the need to examine the reasonableness of the legislation.

51 Neither in their briefs nor at the hearing on this motion did the defendants offer any arguments in support of the necessity or reasonableness of the 1975 Act, as applied to the plaintiffs. Indeed, the only question presented by the instant motion which defendants' counsel addressed was the preliminary inquiry into whether a contract existed.

Karen PINEMAN et al.,
Plaintiffs-Appellees,

v.

William G. OECHSLIN et al.,
Defendants-Appellants

No. 376, Docket 80-7562.

United States Court of Appeals,
Second Circuit.

Argued Nov. 17, 1980.

Decided March 16, 1981.

Plaintiffs brought suit challenging constitutionality of state of Connecticut's revision of its State Employees Retirement Act to conform to requirements of federal civil rights law. The United States District Court for the District of Connecticut, Jose A. Cabranes, J., 494 F. Supp. 525, declared revision of Act impaired state's contractual obligations in violation of contract clause of the United States Constitution, and defendants appealed.

The Court of Appeals, Newman, Circuit Judge, held that abstention was appropriate in suit so that state courts could be given opportunity to adjudicate contract law aspect of plaintiffs' claim, even though federal courts, thereafter resolving the constitutional issue, would not be obliged to give state court ruling the conclusive deference that abstention normally entails.

Vacated and remanded.

Peter W. Gillies, Deputy Atty, Gen., Hartford, Conn. (Carl R. Ajello, Atty. Gen., Bernard F. McGovern, Jr., Asst. Atty. Gen., and J. Sarah Posner, Asst. Atty. Gen., Hartford, Conn., on brief), for defendants-appellants.

Paul W. Orth, Hartford, Conn. (Austin Carey, Jr., Harry Franklin, Robert Krzys, Eleanor K. May and Hoppin, Carey & Powell, Hartford,

Conn., on brief), for
plaintiffs-appellees.

Robert F. McWeeny and Fleischman,
Sherbacow, McWeeny & Cohn, Hartford,
Conn., submitted a brief for
Connecticut State Federation of
Teachers, AFT, AFL-CIO, as amicus
curiae.

Before LUMBARD, NEWMAN, and KEARSE,
Circuit Judges.

NEWMAN, Circuit Judge:

This appeal concerns the
constitutionality of the State of
Connecticut's revision of its State
Employees Retirement Act, Conn. Gen.
Stat. §5-152 et seq., to conform to the
requirements of the federal civil
rights laws. The District Court for
the District of Connecticut (Jose A.
Cabranes, Judge) struck down the
revisions for impairing contractual
obligations in violation of the

Contract Clause of the United States Constitution.¹ Pineman v. Oechslin, 494 F. Supp. 525 (D.Conn.1980). We vacate and remand to allow the state courts an initial opportunity to decide the important question of state law at issue in this lawsuit.

Until 1974 a Connecticut state employee's eligibility for pension benefits varied according to gender; women with 25 years of service were eligible for retirement with full benefits at age 50, while men with the same length of service became eligible at age 55, Conn.Gen.Stat. §5-162(c)(1) (amended 1975); for employees with 10 to 25 years of service, the eligibility age for retirement with full benefits was 55 for women and 60 for men, Conn.Gen.Stat. §5-162(d)(1) (amended 1975). Similar five-year eligibility differences, based on gender, existed

for reduced pension benefits, which were available under certain circumstances, Conn.Gen.Stat.

§§5-163(c) and 5-166(a) (amended 1975), and the tables by which benefits were calculated ensured that a female retiree received benefits equal to those received by a male retiree five years her senior, Conn.Gen.Stat.

§5-162(d)(3) (amended 1975).

In 1974 these five-year retirement age differentials were found to discriminate against men in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. (1976). Fitzpatrick v. Bitzer, 390 F. Supp. 278 (D.Conn.1974). In order to remedy that discrimination, the State legislature amended the retirement statute in 1975 to equalize the terms and benefits of the retirement system by raising the retirement eligibility ages for female

employees so that they equaled the ages required for male employees. P.A. No. 75-531 (1975) ("the 1975 Act"). The 1975 Act established one retirement eligibility age for each category of eligible employee regardless of gender.²

Plaintiffs-appellees, who represent various classes of state employees, challenged the constitutionality of the 1975 Act under the Contract Clause for impairing the State's alleged contractual obligation to provide them with benefits at the retirement ages previously established.³ By raising the ages, the State effectively reduced benefits for female employees. This reduction occurs either because the length of time benefits are received is shorter or the annual amount received is less. All women who wish to retire at the earliest possible age, set

according to their length of service, will find that this minimum eligibility age is now increased by five years.

Most women who retire at the same age at which they would have retired under the prior system will find that their annual benefit level is reduced.⁴

The District Court, on appellees' motion for summary judgment, held that the 1975 Act, as applied to appellees, violated the Contract Clause. The Court also noted that the Act's prospective application to employees who were not employed by the State on the Act's effective date (June 30, 1975) was not challenged and, in any event, would be constitutional.

In a thorough and carefully considered opinion, the District Court pursued traditional Contract Clause analysis, first considering whether a contractual obligation existed and, if

so, whether the new statute was an unconstitutional impairment of that obligation. Allied Structural Steel Co v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977); see Note, A Process-Oriented Approach to the Contract Clause, 89 Yale L.J. 1623 (1980). Although no Connecticut court had ever ruled on the issue of when, or to what extent, the pension rights of the state employees vest, the District Court found, from a combination of factors, that the Retirement Act, as it existed prior to the 1975 revision, created a contractual obligation. The Court emphasized state court decisions concerning the contractual nature of private-employer pension plans, Bird v. Connecticut Power Co., 144 Conn. 456,

133 A.2d 894 (1957¹); Borden v. Skinner
Chuck Co., 21 Conn.Sup. 184, 150 A.2d
607 (Super.Ct. 1958), and Wyper v.
Providence Washington Insurance Co.,
533 F.2d 57 (2d Cir. 1976) (construing
Connecticut law); the statutory
requirement that state employees
participate in, and contribute to, one
of the state retirement plans,
Conn.Gen.Stat. §§5-157, 5-160 and
5-161 (1975); and the reliance
interest of female employees who had
entered state service before the
enactment of the 1975 Act, expecting to
retire at the lower ages and receive
the established benefit levels. Having
found an enforceable state law
obligation, the District Court then
concluded that the 1975 revision
violated the Contract Clause because it
was neither necessary nor reasonable.

[1] In reviewing the District Court's conclusions,⁵ we focus our attention on the initial question whether the pre-1975 Retirement Act created a contractual obligation obliging Connecticut to maintain the pre-1975 retirement ages for female state employees who had not yet begun receiving retirement benefits when the Act was revised. This is an issue of both state and federal law. Initially it is a question of state law, for only those arrangements enforceable as contractual obligations under state law are protected by the Contract Clause against impairment. At the same time, there is a federal law component to the inquiry. Federal courts must have the ultimate authority to determine, as a matter of constitutional law, whether a particular arrangement, of the sort normally enforceable as a contract

under state law, is a contract protected by the Contract Clause; otherwise, states could always evade the restraint of the Clause by determining, through legislation or adjudication, that an arrangement previously regarded as a contract was no longer enforceable. For this reason the Supreme Court has frequently instructed that federal courts must independently determine the existence of a contract and the nature and extent of its obligations in order to decide whether it enjoys the protection of the Contract Clause. E.g., Irving Trust Co. v. Day, 314 U.S. 566, 561, 62 S.Ct. 398, 401, 86 L.Ed. 452 (1942). This federal law aspect of a Contract Clause case is often the dominant inquiry, because, at least in modern cases, the state law status of a contract is rarely in dispute. See Allied

Structural Steel Co. v. Spannaus,
supra; United States Trust Co. v. New
Jersey, supra; Veix v. Sixth Ward
Building & Loan Association, 310 U.S.
32, 60 S.Ct. 792, 84 L.Ed 1061 (1940);
Home Building & Loan Association v.
Blaisdell, 290 U.S. 398, 54 S.Ct. 231,
78 L.Ed 413 (1934). In this case,
however, there is considerable
uncertainty as to the state law nature
of contingent pension benefits for
public employees.

No Connecticut court has yet ruled
on the precise question whether state
employees have vested pension rights
prior to becoming eligible to receive
benefits. The states that have
considered the question have adopted a
variety of approaches. Some states
hold that there are no rights under a
pension plan until the state employee
satisfies all the eligibility

requirements, including age and years of service, for receiving benefits. See, e.g., Etherton v. Wyatt, 155 Ind.App. 440, 293 N.E. 2d 43 (Ct.App.1973); McFeely v. Pension Comm'n 8 N.J. Super., 575, 73 A.2d 757 (Law Div.1950); Creps v. Board of Firemen's Relief & Retirement Fund Trustees, 456, S.W. 2nd 434 (Tex.Civ.App.1970). Others hold that pension rights vest unconditionally upon employment. See, e.g., Yeazell v. Copins, 98 Ariz., 109, 402 P.2d 541 (1965); N.Y. Const. art. V, §7. Still others apply a limited vesting concept, holding that pension right vest upon employment subject to "reasonable" modification by the public employer. See, e.g., Stork v. State, 62 Cal.App.3 465, 133 Cal. Rptr. 207 (1976); Police Pension Relief Bd. v. Bills, 148 Colo. 383, 366 P.2d 581 (1961); City of

Frederick v. Quinn, 35 Md.App. 626, 371 A.2d 724 (Ct.Spec.App.1977). And some determine vesting rights according to the nature of the employee's contributions: voluntary plans vest upon employment, but mandatory plans do not vest. See, e.g., State ex rel. O'Donald v. City of Jacksonville Beach, 142 So.2d 349 (Fla.Dist.Ct.App.1962), aff'd, 151 So.2d 430 (1963). Cf. United States Railroad Retirement Bd. v. Fritz,—U.S.—, 101 S.Ct 453, 66 L.Ed.2d 368 (1980) (railroad retirement benefits, established by federal law, are not contractual); Flemming v. Nestor, 363 U.S. 603, 610-11, 80 S.Ct. 1367, 1372, 4 L.Ed.2d 1435 (1960) (social security benefits are not contractual; Congress's reservation of right to alter, amend, or repeal the system simply makes express what is implicit in the institutional needs of the program).

[2] In the absence of any authoritative ruling by the courts of Connecticut on the vesting of state employee pension rights, both sides in this case have relied on a small number of Connecticut decisions on somewhat related questions of pension law. Bird v. Connecticut Power Co., supra; Borden v. Skinner Chuck Co., supra; Fraser v. City of Norwich, 137 Conn. 43, 75 A.2d 60 (1950); State ex rel. Herbert v. Ryan, 16 Conn.Sup. 319 (Super.Ct.1949). The District Court, analogizing from a decision in the field of private pensions, Bird v. Connecticut Power Co., supra, predicted that Connecticut courts would recognize contractual rights to public pensions arising immediately upon entry into state employment. We are not prepared either to accept or to reject that prediction. In our view abstention is

appropriate to afford the state courts an opportunity to adjudicate the contract law aspect of appellees' claim, even though the federal courts, thereafter resolving the constitutional issue, will not be obliged to give the state court ruling the conclusive deference that abstention normally entails. See Atlantic Coast Line Railroad, Co. v. Phillips, 332 U.S. 168, 170, 67 S.Ct. 1584, 1585, 91 L.Ed. 1977 (1947); Irving Trust Co. v. Day, supra, 314 U.S. at 561, 62 S.Ct at 401; Higginbotham v. City of Baton Rouge, 306 U.S. 535, 538-39, 59 S.Ct 705, 706, 83 L.Ed. 968 (1939).

Despite the lack of the usual conclusiveness of a state court determination of state law, abstention principles are fully applicable in this case. The issues in this lawsuit combine significant aspects of both the

Pullman⁶ and Burford⁷ branches of the abstention doctrine. The state common law rule⁸ governing the vesting of public employee pension rights is highly uncertain. The subject matter, the fixing of compensation benefits to state employees, is of vital importance to the State and its governmental functioning. See National League of Cities v. Usery, 426 U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976). State autonomy and the relationship between state and federal authority would be impaired were the federal courts to set state policy independently and follow their own instincts as to state contract law. Considerations of comity that underlie our federal system of government make abstention appropriate. See Burford v. Sun Oil Co., 319 U.S. 315, 332, 334, 63 S.Ct.

1098, 1106, 1107, 87 L.Ed 1424 (1943);
Railroad Commission v. Pullman, 312
U.S. 496, 498, 501, 61 S.Ct 643, 645,
85 L.Ed. 971 (1941).

The District Court's judgment with respect to the invalidity of the 1975 Act, as applied to persons employed before June 30, 1975, is vacated and remanded for further proceedings in accordance with this opinion.⁹ No costs.

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FOOTNOTES

¹ The Clause provides: "No State shall ... pass any ... Law impairing the Obligation of Contracts" U.S. Const. art. I, §10, cl. 1.

² The 1975 Act adopted the retirement ages formerly applicable only to male employees, as the new, uniform eligibility ages. Conn.Gen.Stat. §§5-162(c), 5-162(d), and 5-163(c) (1975). However, all employees, both male and female, who would reach the ages at which female employees were eligible to retire under the pre-1975 Act, within five years of the effective date of the 1975 Act, i.e., by June 30, 1980, were eligible to retire at those lower ages. Conn.Gen.Stat. §5-163a (1975).

³ Appellees also challenged the 1975 amendments to the State Employees Retirement Act under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. They alleged that the amendments constituted a taking of property-their contract rights to pension benefits-without just compensation, and an arbitrary and irrational classification of employees-one according to birthdate-because employees who would reach the former, lower retirement age within five years of the enactment of the amendments, by June 30, 1980, were exempted from the higher retirement eligibility ages established by the amendments. Because the District Court found that the 1975 amendments violated the Contract Clause, it did not reach the merits of these claims. Pineman v.

Oechslein, 494 F.Supp. 525, 536 n.26
(D.Conn.1980).

4 Benefits under the plan for those retiring with less than 25 years of service are determined by a fixed percentage of the employee's earnings, which increases according to the employee's age at retirement. For example, a female employee with more than 10 years of service, who retired at age 65 under the pre-1975 Act (although she could have retired at 55), would have received annual benefits equal to the sum of 1.25% of her social security earnings and 2.5% of her earnings in excess of the amount on which the State made social security contributions, both multiplied by her years of service. Conn.Gen.Stat. §5-162(d)(3) (amended 1975). But under the present benefit schedule, if she retired at that same age, she would receive annual benefits equal to the sum of 1% of her social security earnings and 2% of her excess earnings, both multiplied by her years of service. Conn.Gen.Stat. §5-162(d)(3) (1975). To obtain the same benefits available under the prior law she must now work five years longer and retire at age 70. Only those female employees who would have retired at age 70 or over, and do so under the 1975 Act, receive the same benefits as they would have received under the pre-1975 Act.

5 The State argues on appeal that the District Court lacked subject matter jurisdiction on the grounds that 42 U.S.C. §1983 and 28 U.S.C. §1343(3) confer jurisdiction only upon claims based on the Fourteenth Amendment or

incorporated through it. We disagree and construe §1343(3) to confer jurisdiction to decide all constitutional claims. Cf. Maine v. Thiboutot,—U.S.—, 100 S.Ct 2502, 65 L.Ed2d 555 (1980) (§§ 1983 encompasses claims based on all laws); Anglo-American Provision Co. v. Davis Provision Co., 105 F. 536 (S.D.N.Y. 1900) (predecessor statutes to §§ 1983 and 1343(3). Rev.Stat. §§ 1977, 1979, and 629, confer jurisdiction on claim under Full Faith and Credit Clause).

⁶ Railroad Commission v. Pullman, 312 U.S. 496, 61 S.Ct 643, 85 L.Ed. 971 (1941).

⁷ Burford v. Sun Oil Co., 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943).

⁸ The principles of abstention apply to cases involving unsettled issues of state common law just as to more typical cases involving a state statute. Cf. H Hart & H. Wechsler, The Federal Courts and the Federal System 992 (2d ed. 1973). One court suggested that a federal court, exercising federal question jurisdiction, should not abstain from deciding a common law issue, although it also found that the state common law at issue was not uncertain. Moreno v. University of Maryland, 420 F.Supp. 541, 553 (D.Md.1976), aff'd without opinion, 556 F.2d 573 (4th Cir. 1977), question certified sub nom. Elkins v. Moreno, 435 U.S. 647, 98 S.Ct. 1338, 55 L.Ed.2d 614 (1978). However, the Supreme Court, in reviewing that decision, certified the state common law question

to the Maryland Court of Appeals because the question was "potentially dispositive" of the constitutional question and no controlling precedents existed; because of the importance of the subject matter (who can become a domiciliary of the state) to state government, the Supreme Court did not defer to the District Court's determination of state law. Elkins v. Moreno, supra, 435 U.S. at 662, 98 S.Ct. at 1347. And, as the Court had previously explained in Bellotti v. Baird, 428 U.S. 132, 151, 96 S.Ct. 2857, 2868, 49 L.Ed.2d 844 (1976), remanding a case for certification of a state law question does not mean that abstention would have been improper if certification had not been available.

⁹Following the procedure established in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct 461, 11 L.Ed.2d 440 (1964), the District Court is to retain jurisdiction pending state court determination of the state law question. If the Connecticut courts adopt the District Court's view of Connecticut contract law, that state employees acquire pension rights unconditionally upon employment, then the District Court may enter a fresh judgment embodying its view of the constitutionality of the retirement age revisions, in which event an appeal may be taken to this Court. If the state courts reject initial vesting of state employee pension rights, then, should the appellees return to District Court, that Court will have to consider the contract issue independently, enlightened by the reasoning of the state courts.

In seeking a state court declaration concerning the contract law issue, appellees will have to consider whether to follow the England option of reserving the federal issue so that they may return to District Court, or whether they prefer to submit all issues to the state courts. If federal issues are reserved, we see no reason why the state courts, if they should decide as a matter of state law that pension rights vest subject only to "reasonable" modification, could not also rule, as a matter of state law, whether the revisions of the 1975 Act are reasonable, having due regard to their nature and origin. Such a state law ruling, if the state courts choose to make it, would be instructive for the federal courts, though not conclusive. We intimate no views on any aspect of the merits.

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eral." The plaintiff, in his appeal, has not challenged either the first or the third of these findings. We have already concluded that there was sufficient evidence so that the second finding was not clearly erroneous. The plaintiff has therefore not established his right to recover under General Statutes § 35-28 (d).

There is no error.

In this opinion the other judges concurred.

KAREN K. PINEMAN ET AL. v. WILLIAM G.
OECHSLIN ET AL.
(12529)

HEALEY, PARSKEY, SHEA, DANNEHY and BIELUCH, Js.

The named plaintiff state employees brought a class action on behalf of themselves and all similarly situated state employees challenging the constitutionality of a 1975 amendment to the State Employees Retirement Act. Prior to 1975, female state employees were permitted to retire at age fifty with twenty-five years of service and male state employees were permitted to retire at age fifty-five with twenty-five years of service. In 1975, the disparate treatment of males and females having been determined to be in violation of the prohibition against sex-based discrimination, the act was amended to establish fifty-five as the retirement age for all state employees with twenty-five years of service. The plaintiffs claimed that the amendment impaired the state's contractual obligation to them in violation of the contract clause of the United States constitution. The trial court rendered judgment for the defendants from which the plaintiffs appealed and the defendants cross appealed. *Held* that because there is no clear expression by the legislature that the State Employees Retirement Act is intended to create vested contractual rights in favor of state employees prior to their satisfaction of all of its eligibility requirements, the act does not create such rights.

Although the State Employees Retirement Act establishes a property interest on behalf of all state employees in the existing retirement fund, which interest is entitled to protection from arbitrary legislation under the state and federal due process provisions, the issue of whether the 1975 amendment to the act constituted a deprivation of that property interest without due process of law was not considered, that issue not having been discussed at trial or briefed or argued here.

Argued December 13, 1984—decision released March 12, 1985

Class action challenging the constitutionality of the 1975 revision of the Connecticut Employees Retirement Act which raised the retirement eligibility age for female employees, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford where the court, *N. O'Neill, J.*, rendered judgment for the defendants, from which the plaintiffs appealed and the defendants cross appealed. *No error.*

Paul W. Orth, with whom was *Austin Carey, Jr.*, for the appellants-appellees (plaintiffs).

Peter T. Zarella, with whom was *Richard R. Brown*, for the appellees-appellants (defendants).

PARSKEY, J. The principal issue presented by this appeal is whether state employees have contractual interests in the State Employees Retirement Act (act), General Statutes §§ 5-152 through 5-192x. Because we agree with the trial court that the act creates no contractual rights we find no error.

The plaintiffs brought a class action in the United States District Court for the District of Connecticut against the named defendant, chairman of the state employees retirement commission, Henry E. Parker, state treasurer, and J. Edward Caldwell, state comptroller. The action sought a declaratory judgment establishing that the State Employees Retirement Act, §§ 5-152 through 5-192x, as amended by No. 75-531 of the 1975 Public Acts, impairs the state's contractual obligations to the plaintiffs in violation of article I, § 10, of the constitution of the United States which provides that "[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts" The district court, agreeing with the plaintiffs, issued a permanent injunction "requiring the defendants to administer the State Employees Retirement Act in a manner which respects the plaintiffs' contractual rights." *Pineman*

v. *Oechslin*, 494 F. Sup. 525, 554 (D. Conn. 1980). On appeal, the United States Court of Appeals for the Second Circuit vacated the district court's judgment and remanded the case with direction that the district court abstain from adjudicating the federal constitutional claim so as to afford the state court an opportunity to adjudicate the plaintiffs' contract claims as a matter of state law. *Pineman v. Oechslin*, 637 F.2d 601 (2d Cir. 1981). The district court thereafter issued an abstention order setting forth the questions which appeared to be undecided, stayed further proceedings of the federal action and retained jurisdiction for such further proceedings as may be appropriate or necessary upon the conclusion of the state court proceedings.

Thereafter the plaintiffs brought an action in the Superior Court seeking, inter alia, a judgment declaring that the "pre-1975 Retirement Act . . . created a contractual obligation obliging Connecticut to maintain the pre-1975 retirement ages for female state employees who had not yet begun receiving retirement benefits when such act was revised by the act on June 30, 1975." The individual plaintiffs consisting of three female (Karen Pineman, Judith Narus, Rose Schewe) and three male (Alphonse S. Marotta, Daniel Clifford, Alfred K. Tyll) state employees, sought and were granted an order certifying their right to maintain the action on behalf of all similarly situated state employees. The trial court, after examining the Retirement Act and other statutes which it deemed relevant, concluded that in enacting the Retirement Act the legislature never intended to create contractual rights in state employees. We agree with the trial court's conclusion.

HISTORICAL BACKGROUND OF THE STATE EMPLOYEES RETIREMENT ACT

The act as initially adopted in 1939 permitted male employees to retire at age fifty-five with twenty-five

years of service and female employees to retire at age fifty with twenty-five years of service. General Statutes (Sup. 1939) § 67e et seq. This disparate treatment of male and female employees continued into 1974. General Statutes (Rev. to 1975) § 5-162. In that year, the act was held to violate the prohibition against sex-based employment discrimination contained in Title VII of the Civil Rights Act of 1964. *Fitzpatrick v. Bitzer*, 390 F. Sup. 278 (D. Conn. 1974), aff'd in part and rev'd in part on other grounds, 519 F.2d 559 (2d Cir. 1975), aff'd in part and rev'd in part on other grounds, 427 U.S. 445, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). At the 1975 session of the General Assembly, the act was amended to establish fifty-five years as the retirement age for all state employees with twenty-five years of service. Public Acts 1975, No. 75-531.¹ It also provided

¹ Public Acts 1975, No. 75-531, provides in relevant part:

"AN ACT CONCERNING ELIGIBILITY FOR STATE RETIREMENT.

"Section 1. Subsection (c) of section 5-162 of the general statutes is repealed and the following is substituted in lieu thereof:

"(c) Schedule 1—Twenty-five or more years of state service.

"(1) EXCEPT AS PROVIDED IN SECTION 5 OF THIS ACT, [Each] EACH member who has completed twenty-five or more years of state service shall be retired, on his own application or on the application of the executive head of the agency employing him, on the first day of the month named in the application, and on or after the member's fifty-fifth birthday[, if a man, or fiftieth birthday, if a woman]. . . .

"Sec. 2. Subsection (d) of section 5-162 of the general statutes is repealed and the following is substituted in lieu thereof:

"(d) Schedule 2—Less than twenty-five years of state service.

"(1) EXCEPT AS PROVIDED IN SECTION 5 OF THIS ACT, [Each] EACH member who has completed less than twenty-five years of state service shall be retired on his own application, on the first day of the month following his application, if [he then meets any one of the following conditions: (A) The member is a woman who has completed five years of state service and reached her sixty-fifth birthday; (B) the member is a woman who has completed ten years of state service and reached her fifty-fifth birthday; (C)] the member [is a man who] has completed ten years of state service and reached his sixtieth birthday. . . .

"Sec. 3. Subsection (c) of section 5-163 of the general statutes is repealed and the following is substituted in lieu thereof:

"(c) EXCEPT AS PROVIDED IN SECTION 5 OF THIS ACT, [A] A

that any employee with twenty-five years of state service who attained the age of fifty prior to June 30, 1980, could elect to retire and receive normal retirement benefits.

member whose state service is terminated because of economy, lack of work or abolition of his position, or who, being an army or air national guard technician in the military department, is dismissed by reason of separation from the national guard because of age, after he has completed twenty-five years of state service but before he has reached his fifty-fifth birthday, [if a man, or her fiftieth birthday, if a woman,] shall be entitled to a retirement income. The amount of each monthly payment shall be determined from subsection (c) of section 5-162, if the member elects the first day of the month on or after such birthday as his retirement date; and shall be the actuarial equivalent of such amount, as determined by the retirement commission, if the member elects the first day of the month on or after his termination date as his retirement date.

"Sec. 4. Subsection (a) of section 5-166 of the general statutes is repealed and the following is substituted in lieu thereof:

"(a) EXCEPT AS PROVIDED IN SECTION 5 OF THIS ACT, [A] A member who leaves state service before he is eligible for retirement but after completing at least ten years of state service, of which at least five years shall have immediately preceded the date of his leaving state service, shall continue to be a member, and shall be eligible for a retirement income as provided in section 5-162, but on a reduced actuarial basis, as determined by the retirement commission[, provided, if such member is a woman she shall be eligible upon reaching her fiftieth birthday and if a man, he shall be eligible] upon reaching his fifty-fifth birthday. Such vested retirement income shall not be subject to divestiture by subsequent employment unless the member withdraws his retirement contribution.

"Sec. 5. (NEW) (a) Any member who has completed twenty-five years of state service and has reached the age of fifty prior to June 30, 1980, may elect to be retired on the first day of the month following such application and receive retirement benefits in accordance with the provisions of subdivision (3) of subsection (c) of section 5-162 of the general statutes, provided such member so elects prior to June 30, 1980.

"(b) Any member who has completed at least ten but less than twenty-five years of state service and reached the age of fifty-five prior to June 30, 1980, may elect to be retired on the first day of the month following his application and receive retirement benefits in accordance with subsection (d) of this section, provided such member so elects prior to June 30, 1980.

"(c) Any member who has completed at least five but less than ten years of state service and has reached the age of sixty-five prior to June 30, 1980, may elect to be retired on the first day of the month following such application and receive retirement benefits in accordance with the provisions of subsection (d) of this section, provided such member so elects prior to June 30, 1980. . . ."

APPLICABLE RULES OF STATUTORY CONSTRUCTION

Prior to entering a discussion of whether the act creates vested contractual rights in the plaintiff employees, we note the appropriate standard of statutory interpretation traditionally applied to questions such as the one before us. "In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." (Footnotes omitted.) *Dodge v. Board of Education*, 302 U.S. 74, 78-79, 58 S. Ct. 98, 82 L. Ed. 57 (1937). "The principal function of a legislative body is not to make contracts but to make laws which declare the policy of the state and are subject to repeal when a subsequent legislature shall determine to alter that policy." *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 58 S. Ct. 443, 82 L. Ed. 685 (1938).

Although the legislature may authorize a contract to be made on behalf of the state; *Wilson v. East Bridgeport School District*, 36 Conn. 280, 282 (1869); there exists a "well-established presumption" against finding that a statute creates private vested contractual

rights absent a clear showing of legislative intent to the contrary. *Taliaferro v. Dykstra*, 434 F. Sup. 705, 710-11 (E.D. Va. 1977). Since the effect of such authorization is to surrender the legislature's governmental power of revision and to restrict the legislative authority of succeeding legislatures, a legislative intent to create contractual rights will not be assumed unless the statutory language expressing such intent is clear and unambiguous. *Indiana ex rel. Anderson v. Brand*, supra, 110 (Black, J., dissenting).

APPROACH TO PUBLIC PENSIONS

The specific issue of whether Connecticut's statutory retirement plan for state employees is contractual in nature is a question of first impression before this court.² To guide us in resolving this issue, we look to the various approaches adopted by other courts that have been confronted with similar questions. See *Pineman v. Oechslin*, 637 F.2d 601, 604-605 (2d Cir. 1981). In a few states, the issue has been removed from the court's domain by the enactment of constitutional or statutory provisions expressly stating that public pension plans give rise to vested contractual rights. Annot., "Vested Right of Pensioner to Pension," 52 A.L.R.2d 437, 441 (1957); see, e.g., N.Y. Const., art. V, § 7; *Pineman v. Oechslin*, 494 F. Sup. 525, 544 n.36 (D. Conn. 1980). No such provision exists in the statutes or constitution of Connecticut.

² In *State ex rel. Kirby v. Board of Fire Commissioners*, 129 Conn. 419, 29 A.2d 452 (1942), we had occasion to address the general issue of the right of governmental employees to public pensions. In that case, involving a claim by a fireman to retirement benefits, we agreed with the defendant board; A-179 Rec. and Briefs, p. 532; that the relator had no contractual rights to his pension. "[U]nder retirement acts generally even where the person eligible for retirement has contributed by way of dues or assessments to make up the retirement fund he has no vested right to retirement." *State ex rel. Kirby, v. Board of Fire Commissioners*, supra, 426. We went on to observe, however, that the relator had a statutory right to receive his pension under the provisions of the municipal charter, which at that time was granted by special act of the General Assembly. See *Baker v. Norwalk*, 152 Conn. 312, 314, 206 A.2d 428 (1965).

Where such an express statement of legislative intent is lacking, the traditional view, still adhered to in many jurisdictions, is that there are no rights, contractual or otherwise, under a pension plan until the state employee satisfies all the eligibility requirements, including age and years of service, for receiving benefits. See *Pineman v. Oechslin*, 637 F.2d 601, 605 (2d Cir. 1981), and cases cited therein. This approach is premised on the view that statutory pension benefits are in the nature of a gratuity, and that public employees have merely an expectancy interest in the pension fund, revocable at the will of the legislature. See *Christensen v. Minneapolis Municipal Employees Retirement Board*, 331 N.W.2d 740, 745-46 (Minn. 1983); Cohn, "Public Employee Retirement Plans — The Nature of the Employees' Rights," 1968 U. Ill. L.F. 32, 34-37 (1968). A simply applied but rigidly doctrinaire analysis developed in which the nature of the employee's rights was classified as contractual or gratuitous, depending upon whether participation in the plan was voluntary or compulsory. Voluntary plans were deemed to create vested rights while compulsory participation meant no vested interest accrued. See annot., 52 A.L.R.2d, *supra*, pp. 441-43.

This rigid analytic approach, and the gratuity concept generally, have been the subject of increasing criticism and judicial discomfort. As one commentator recently put it: "In the seventh decade of the 20th century it seems somewhat absurd to speak of a pension as in the 'nature of a bounty springing from the appreciation and graciousness of the sovereign.' [*Blough v. Ekstrom*, 14 Ill. App. 2d 153, 160, 144 N.E.2d 436 (1957).] Medieval notions of the beneficence and graciousness of worldly monarchs have no relevance to modern notions of sovereignty." Cohn, *supra*, p. 37; see *Christensen v. Minneapolis Municipal Employees Retirement Board*, *supra*, 746-47; *Spina v. Consoli-*

dated *Police & Firemen's Pension Fund Commission*, 41 N.J. 391, 401, 197 A.2d 169 (1964). We find this criticism valid and persuasive, and therefore decline to view the retirement benefits created by the act as mere gratuities, as to which the legislature enjoys an unfettered power of revocation.

In search of a more modern and realistic approach to the nature of employee rights in public pensions, a growing minority of jurisdictions has construed the existence of vested rights, contractual in nature, even in the absence of a clear expression of legislative intent to create such rights. Three basic approaches have evolved in jurisdictions analyzing public pensions in contractual terms. Two of these employ a limited vesting concept, holding that pension rights vest upon employment subject to "reasonable" modification by the public employer. See *Pineman v. Oechslin*, 637 F.2d 601, 605 (2d Cir. 1981), and cases cited therein. One version of the limited vesting approach permits a modification of vested rights if the change bears a material relation to the purposes of the pension system, and if any resultant disadvantage to the employee is accompanied by an offsetting advantage. See, e.g., *Stork v. California*, 62 Cal. App. 3d 465, 133 Cal. Rptr. 207 (1976); *Police Pension & Relief Board v. Bills*, 148 Colo. 383, 366 P.2d 581 (1961). The second view allows those modifications to the retirement contract that reasonably enhance the actuarial soundness of the retirement fund. See, e.g., *Harvey v. Allegheny County Retirement Board*, 392 Pa. 421, 141 A.2d 197 (1958). Finally, a third approach characterizes the public employee's interest in a statutory pension in terms of promissory estoppel, holding that rights thereunder are subject to modification pursuant to the state's police power. See *Christensen v. Minneapolis Municipal Employees Retirement Board*, *supra*, 747. Under this last approach, which was utilized by the federal district court in determining the

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plaintiff employees' rights under the act, a statutory pension plan is found to constitute a contract implied-in-law based upon the reasonable expectations of the public employees. See *Pineman v. Oechslin*, 494 F. Sup. 525, 538-45 (D. Conn. 1980).

Although there is a seductive appeal in the contract-oriented approaches adopted by other jurisdictions, we decline to depart from the well established rules of statutory construction discussed earlier, namely, that a statute does not create vested contractual rights absent a clear statement of legislative intent to contract. Upon examination of the case law in this area, it becomes clear that the contract approach plays havoc with basic principles of contract law, traditional contract clause analysis and, most importantly, the fundamental legislative prerogative to reserve to itself the implicit power of statutory amendment and modification. See *Flemming v. Nestor*, 363 U.S. 603, 610-11, 80 S. Ct. 1367, 4 L. Ed. 2d 1435 (1960).

To find that a statutory pension plan gives rise to contractual rights in public employees, while permitting unilateral modification of the pension "contract" by the state under certain circumstances, defies the basic contract law tenet that modification requires mutual assent. *Lar-Rob Bus Corporation v. Fairfield*, 170 Conn. 397, 402, 365 A.2d 1086 (1976); see note, "Public Employee Pensions in Times of Fiscal Distress," 90 Harv. L. Rev. 992, 1001-1002 (1977). "True the needed power in the Legislature to revise a plan without the consent of the parties to the 'contract' could be said to be 'implied,' but it seems odd to say the State may unilaterally rewrite its own contract or rewrite contracts between its municipal agents and others." *Spina v. Consolidated Police & Firemen's Pension Fund Commission*, *supra*, 404. In addition, the "reasonable modification" analysis may not always comport with the constitutionally mandated heightened level of

employees of property interest in
pensions benefits without due process
of law.

Summary judgment for state.

Paul W. Orth, Hoppin, Carey &
Powell, Hartford, Conn., for plaintiffs.

Peter T. Zarella, Brown, Paindiris
& Zarella, Hartford, Conn., for
defendants.

RULING ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT

JOSE A. CABRANES, District Judge:

Introduction

Plaintiffs in this class action are all employees of the State of Connecticut who were employees of the state on June 30, 1975 and remained employees as of April 1, 1977 and who did not reach the retirement age of the pre-existing state retirement system prior to June 30, 1980. The defendants are the Chairman of the Employees State Retirement Commission (originally, in this action, William G. Oechslein and currently William J. Fallon); the Treasurer of the State of Connecticut; and the Comptroller of the State of Connecticut who also serves as

judicial scrutiny applicable under the contract clause to contractual modifications when the state is a party to the contract. See *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26, 97 S. Ct. 1505, 52 L. Ed. 2d 92, reh. denied, 431 U.S. 975, 97 S. Ct. 2942, 53 L. Ed. 2d 1073 (1977). The two approaches that employ the limited vesting concept, allowing for reasonable modifications by the state of the statutory "contract," may thus conflict with basic contract law and contract clause analysis. It makes little sense to strain established rules of statutory interpretation to find a contract where the requisite express legislative intent is lacking, only to strain other equally well settled legal principles to allow for necessary unilateral modification by the state.

The promissory estoppel approach, in focusing attention on the reasonable expectations of the employee, ignores the distinction traditionally made between private and public entities in determining the existence of contractual rights and obligations. "[C]ourts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel." *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983). This distinction can be viewed as another way of articulating the requirement of an express legislative intent to contract. When the legislature intends to surrender its power of amendment and revision by creating a contract and thereby binding future legislatures, it must declare that intention in clear and unambiguous terms. A relinquishment of this authority should not occur by legislative inadvertence or judicial implication. To hold otherwise "requires the legislature and pension fund administrators to walk a tight rope whenever changes are indicated, and to accept risks which may turn into substantial financial obligations years after the fact." Cohn, *supra*, p. 48.

In this case, there is no clear expression by the legislature that the act was intended to create vested contractual rights in state employees prior to the satisfaction of all eligibility requirements. Neither the original retirement act of 1939 nor any of its subsequent amendments contain any language spelling out a contract between the state and its employees. There is no reference within the statutory scheme to the terms and conditions of a contract with respect to retirement benefits. The plaintiffs do not claim the existence of an express contract. Rather, their position appears to be that promissory emanations from the act of deferred compensation designed to induce state employees to accept and retain public employment, together with reliance on such "promises" by the employee, are sufficient to create a contractual relationship between the state and its employees. If that reasoning were carried to its logical conclusion, the state would be powerless to reduce the pay or shorten the tenure of any state employee without posing a possible contract clause violation. We do not believe that such a heavy obligation may be imposed upon the state unless the legislature clearly evidences an intent to assume it. Since no such intent is apparent in this case, we hold that the act does not create vested contractual rights and obligations in favor of state employees. In our constitutional scheme, the legislature must be free to exercise its constitutional authority without concern that each time a public policy is expressed contractual rights may thereby be created.

The fact that state employees have no vested contractual rights in retirement benefits, however, does not mean that the act confers no rights at all. Initially, we note that the employees have statutory rights to retirement benefits once they satisfy the eligibility requirements of the act by becoming eligible to receive benefits. In addition, we conclude that the statutory pension scheme establishes a property interest on

behalf of all state employees in the existing retirement fund, which interest is entitled to protection from arbitrary legislative action under the due process provisions of our state and federal constitutions. See *Flemming v. Nestor*, supra, 611; *Spina v. Consolidated Police & Firemen's Pension Fund Commission*, supra, 402. Unlike the gratuity concept, the due process approach protects public employees from legislative confiscation of the retirement fund and arbitrary forfeiture of pension benefits. At the same time, a due process analysis provides the necessary flexibility that the contract approach lacks and avoids the strain on settled principles of contract law, statutory interpretation and contract clause jurisprudence that the latter view entails. Additionally, we note that the due process approach has received favorable consideration from legal commentators. See note, supra, pp. 1003-1005; Cohn, supra, pp. 48-51. Although the plaintiff employees alleged a violation of their due process rights in their complaint, this claim was not discussed in the federal or state trial court decisions, nor was it briefed or argued by the parties on appeal. We thus decline to decide whether the 1975 revisions of the act constitute an unconstitutional deprivation of the employees' property interest in the retirement fund without due process of law.

Our holding that the act confers no contractual rights in the statutory pension plan on state employees renders it unnecessary to address the other claims raised by the parties on the appeal and the cross appeal.

There is no error.

In this opinion the other judges concurred.

Karen PINEMAN, et al.

v.

William J. FALLON, Chairman of the
State Retirement Commission, et al.

Civ. No. H-77-164(JAC).

United States District Court,
D. Connecticut.

June 9, 1987.

Connecticut state employees brought action challenging constitutionality of amendment to State Employees Retirement Act which equalized minimum retirement age for male and female employees. The District Court, José A. Cabranes, J., held that: (1) no valid contract existed between state and its employees which prohibited legislature's modification of retirement system, and (2) amendment did not deprive state

Secretary of the State Employees
Retirement Commission.

Plaintiffs have brought this action challenging the 1975 Amendments to the Connecticut State Employees Retirement Act. The 1975 legislation established a minimum age of fifty-five for retirement from state employment for both male and female employees with a least twenty-five years of service. Under previous law, female employees with the requisite years of service were eligible to retire with full pension rights at the age of fifty and male employees were eligible for retirement at the age of fifty-five. In 1974, a challenge to the constitutionality of the retirement provisions resulted in a ruling that the disparate treatment of male and female employees was in violation of

Title VII of the 1964 Civil Rights Act. This case involves a challenge to the provisions of the retirement system adopted by the legislature in 1975 in response to the 1974 decision.

Plaintiffs argue that the 1975 legislation is unconstitutional. They base this claim on two theories. First, they claim a contractual right against the State of Connecticut to the earlier lower minimum retirement age. Second, plaintiffs assert that the 1975 legislation represents a deprivation of state employees' property interest in pension benefits without due process of the law.

In 1980, this court ruled in favor of the plaintiffs on their contract claim. (Plaintiffs, in their initial suit before this court did not assert a

property rights claim.) In 1981, however, the United States Court of Appeals for the Second Circuit remanded the case to the district court for the entry of an order of abstention, to give the judicial system of the State of Connecticut an opportunity to determine certain questions of Connecticut state law. Proceedings in this court were stayed pending consideration of the case by the state courts. In 1985, the Supreme Court of the State of Connecticut held that the State had not entered into a contractual relationship with employees under the minimum retirement age with respect to prospective benefits. Thus, they held that the retirement arrangement provided under the State Employees Retirement Service is not contractual.

Informed by the reasoning of the Connecticut Supreme Court and an independent analysis of the merits of plaintiffs' claim, this court agrees that no legally valid contract exists between the State and its employees which prohibits the legislature's 1975 modification of the retirement system.

Further, in response to plaintiffs' due process claim, this court finds that the 1975 legislative action was neither arbitrary nor irrational. Accordingly, there is no basis for interference by this court with the judgment of the state legislature. Plaintiffs' claims fail on both counts and summary judgment is granted to defendants.

It should be emphasized that the legislature did not undertake to modify

the retirement benefits of those who had already left state service by 1975. Indeed, the 1975 enactment provided a "grandfather clause" which permitted all state employees who would become eligible for retirement under the former system within five years of the new legislation to take advantage of the former, more liberal plan. This case and today's ruling have no bearing on the retirement status of these other employees.

I.

Background of the Case

The case before this court began in 1977 when the named plaintiffs brought a class action on behalf of themselves and similarly situated state employees. The suit was brought to challenge the constitutionality of a 1975 Connecticut state law, Public Act 75-531 ("the 1975 Act"), which amended portions of the 1939 Connecticut State Employees Retirement Act, 1939 Conn.Pub. Acts 271 ("the 1939 Act" or "SERA"). The factual background leading to the 1977 litigation and the legislative history of the 1975 Act are set forth in detail in Pineman v. Oechslin, 494 F.Supp. 525 (D.Conn.1980) ("Pineman I"), vacated and remanded on grounds of abstention, 637 F.2d 601 (2d

Cir.1981)("Pineman II"). Therefore, only a summary of the background of this case will be set forth here for purposes of the discussion. The 1975 Act was a response to the 1974 decision in Fitzpatrick v. Bitzer,¹ in which then Chief Judge T. Emmet Clarie held invalid the provisions of SERA requiring male employees of the state to work five years longer than similarly situated female employees in order to earn state pension benefits. Prior to Fitzpatrick, female state employees with twenty-five years of service could retire with full benefits when they reached the age of fifty, while male state employees with twenty-five years of service could not retire with full benefits until they reached the age of fifty-five. In Fitzpatrick, Chief Judge Clarie held that this disparate treatment of men

and women violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Between the time of the 1974 Fitzpatrick decision and the passage of the 1975 Act, the State of Connecticut permitted both male and female employees to retire with full pension benefits at the ages formerly applicable only to women. Pineman I, 494 F.Supp. at 533.

At the next legislative session, the General Assembly passed the 1975 Act, which established for all employees retirement ages identical to the higher retirement ages applicable only to male employees prior to Fitzpatrick. The 1975 Act also contained a "grandfather clause" which exempted from the new, more stringent

age requirements for eligibility those employees who would, before June 30, 1980, reach the lower age threshold of prior law. See Conn.Gen.Stat. §5-163(a).

In 1980, this court ruled that the 1975 Act constituted an unconstitutional impairment of the State's contractual obligation and enjoined the enforcement of the 1975 Act "with respect to those state employees who were in state service on June 30, 1975 (the effective date of the 1975 Act), are still in the state's service, and will not be eligible to retire with full pension benefits prior to June 30, 1980." Pineman, I 494 F.Supp. at 528. In granting summary judgment for the plaintiffs, this court analyzed the 1975 Act under the Contract Clause of the United States

Constitution² consistent with the examination prescribed by the Supreme Court in United States Trust Co. v. New Jersey, 431 U.S. 1, 22-23, 25-26, 97 S. Ct. 1505, 1517-1518, 1519-1520, 52 L.Ed.2d 92 (1977) ("United States Trust") and Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 241, 98 S.Ct. 2716, 2720, 57 L.Ed.2d 727 (1978).³

Defendants appealed the decision of this court to the United States Court of Appeals for the Second Circuit which, finding abstention appropriate, vacated the judgment and remanded the suit. The court of appeals observed that "[n]o Connecticut Court has yet ruled on the precise question whether the state employees have vested pension rights prior to becoming eligible to receive benefits." Pineman, II, 637

F.2d at 604. The court of appeals directed the district court to abstain from ruling on the state law issue, "to afford the state courts an opportunity to adjudicate the contract law aspect of appellees' claim." Id. at 605⁴. In the instant dispute, although abstention meant the postponement of the exercise of federal jurisdiction, the court of appeals concluded that abstention would be appropriate "even though the federal courts, thereafter resolving the constitutional issue, will not be obliged to give the state court ruling the conclusive deference that abstention normally entails." Id.

Following the procedure established in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964) ("England"), the court of appeals

directed that this court retain jurisdiction pending the state court determination of the state law question. In accordance with the decision of the court of appeals, this court entered an abstention order on August 4, 1981.

The plaintiffs filed a complaint in Connecticut Superior Court on August 25, 1981, and invoking the doctrine of England, reserved their right to return to this court. On May 4, 1984, the superior court ruled that no contractual obligation was created by SERA. That decision was affirmed by the Connecticut Supreme Court in a ruling issued on March 12, 1985, holding that SERA created no contractual rights that could have been impaired by the 1975 legislation.

Pineman v. Oechslin, 195 Conn. 405, 488 A.2d 803 (1985) ("Pineman III").

In 1985, plaintiffs, having reserved the federal issues, returned to this court, asking it "to consider the contract issue independently, enlightened by the reasoning of the state courts." Pineman II, 637 F.2d at 606 n. 9.

On August 13, 1985, upon defendants' Motion for Determination of the Status of the Proceedings (filed June 17, 1985), this court held that the court of appeals' vacatur of the district court judgment and remand of the case did not render void all pleadings and admissions filed after filing of the initial complaint. Pineman v. Oechslin, 616 F.Supp. 1227 (D.Conn. 1985) ("Pineman IV").

Although denying defendants' motion to initiate a de novo proceeding, this court did subsequently grant defendants' request to add a special defense, to wit: "If the Retirement Statutes, as set out in the plaintiffs' complaint, prior to P.A. 75-531 set out the terms of an enforceable contract and P.A. 75-531 was an unlawful impairment of those contractual rights the plaintiffs are not entitled to relief because of provisions contained in certain collectively bargained agreements entered into in 1977." Answer and Special Defenses (filed Sept. 23, 1985). See Endorsement Order (filed Sept. 19, 1985) on Motion for Permission to File Amended Answer and Add Special Defenses (filed June 17, 1985). Defendants maintain that plaintiffs are estopped from asserting their constitutional claims because the

negotiated agreement supercedes and cancels all prior practices and agreements and serves to waive all prior complaints. Because this court grants defendants' motion for summary judgment, it is unnecessary to reach this special defense.

II.

Plaintiffs' Claim under the Contract Clause of the Constitution

"In general, a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." United States Trust, 431 U.S. at 17 n. 14, 97 S.Ct. at 1515 n. 14. In Pineman III, the Connecticut Supreme Court stated that a statute

does not create vested contractual rights absent a clear statement of legislative intent to contract.

Pineman III, 195 Conn. at 410-11, 488 A.2d at 806. Finding that there was neither clear expression nor clear intent on the part of the Connecticut legislature to create vested contractual rights in favor of state employees prior to their satisfaction of all retirement eligibility requirements, the Connecticut Supreme Court held that SERA created no contractual rights which would favor the plaintiffs in this case. Id. at 416, 488 A.2d at 809.

Whether Connecticut has bound itself by contract is a question primarily of state law, to which this court must "accord respectful consideration and great weight," but

"in order that the constitutional mandate may not become a dead letter, we are bound to decide for ourselves whether a contract was made, what are its terms and conditions, and whether the State has, by later legislation, impaired its obligation." Indiana ex rel. Anderson v. Brand, 303 U.S. 95, 100, 58 S.Ct. 443, 446, 82 L.Ed. 685 (1938). Where a state statute is challenged as violative of the Contract Clause of the Constitution, "the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope of meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of a state court." Irving Trust Co. v. Day, 314 U.S. 556, 561, 62 S.Ct. 398, 401, 86 L.Ed. 452 (1942).

Thus, while giving great significance to the views of Connecticut's highest court, this court must make an independent determination whether the retirement arrangement at issue in this case is indeed a "contract" for Contract Clause purposes. The Supreme Court has recently emphasized that we are to ascribe great weight to the clear legislative intent or absence of intent to form a contract in reviewing the permissibility of subsequent legislative actions. "[A]bsent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" National Railroad Passenger Corp. v.

Atchison, Topeka & Santa Fe Railway Co., 470 U.S. 451, 465-66, 105 S.Ct. 1441, 1451-52, 84 L.Ed.2nd 432 (1985)("Amtrak") (quoting Dodge v. Board of Education, 302 U.S. 74, 79, 58 S.Ct. 98, 100, 82 L.Ed. 57 (1937)).

The language of the 1939 Act which established the earlier age and service requirements for retirement of Connecticut state employees contains no explicit reference to the establishment of a contractual relationship between the state and its employees. Neither the language nor the circumstances of the passage of the State Employees Retirement Act manifests an intent on the part of the Connecticut legislature to bind itself contractually to the State's employees with respect to the level of retirement benefits prior to the time at which an employee becomes

eligible to receive such benefits. See
Pineman III, 195 Conn. at 416, 488 A.2d
at 809.

Where the legislature has intended that there be no subsequent changes to benefits provided under a statutory program, it has clearly so stated. For example, with respect to the Connecticut Municipal Employees Retirement Act, the legislature included a separate specific provision that "[t]he general assembly shall enact no legislation which diminishes or eliminates the rights or benefits granted to any individual under any municipal retirement or pension system." Conn.Gen. Stat. §2-14a. No comparable provision was adopted with respect to SERA.

Further, plaintiffs in this case have themselves pointed to language in handbooks provided to state employees which describes procedures for those whose service in the state system is less than ten years. Plaintiffs acknowledge that the booklets refer to "Termination of Service Before Retirement" and plaintiffs advert to the handbook words, "IF YOU HAVE NO VESTED RIGHTS." Brief in Support of Motion for Summary Judgment (filed Dec. 30, 1985) ("Plaintiffs' Brief in Support") at 12 (capitalization in original). Rather than supporting plaintiffs' claim that a contract exists, however, the language supports defendants' claim that the intent of the state retirement system is to confer benefits only upon the full completion of all terms of eligibility, at which time rights to benefits vest.

It is significant that this case concerns benefits to government workers. In United States v. Larionoff, 431 U.S. 864, 97 S.Ct. 2150, 53 L.Ed.2d 48 (1977), involving enlistment bonuses for members of the military, the Court held that the entitlement of government workers to pay and benefits "must be determined by reference to the statutes and regulations governing compensation ... rather than to ordinary contract principles." Id. at 869, 97 S.Ct. at 2154. Applying this doctrine, "courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis of a contract or an estoppel." Kizas v. Webster, 707 F.2d 524, 535 (D.C. Cir. 1983), cert.

denied, 464 U.S. 1042, 104 S.Ct. 709,
79 L.Ed.2d 173 (1984).

[1] Absent specific language in the statute, or an authoritative expression by the State evidencing an understanding that a contract was contemplated, the conclusion of the Supreme Court of Connecticut that SERA does not create vested contractual rights in favor of state employees prior to their satisfaction of all eligibility requirements is a reasonable one. SERA represented the adoption by Connecticut of a policy for dealing with future state pensioners, not a contractual agreement. The 1975 Act, therefore, does not offend the federal Contract Clause. "Policies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the

obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." Amtrak, 470 U.S. at 466, 105 S.Ct. at 1452.

III.

Plaintiffs' Claim under the Due Process Clause

[2] Plaintiffs also argue that state employees have a property interest in the retirement fund and retirement benefits which are protected under the Due Process Clause from the allegedly "arbitrary" legislative action taken in 1975. Plaintiffs' contention that the 1975 legislative action was arbitrary or irrational is not persuasive.

In Pineman III, Connecticut's Supreme Court declined "to decide whether the 1975 revisions of the act constitute an unconstitutional deprivation of the employees' property interest in the retirement fund without due process of law". Pineman III, 195 Conn. at 417, 488 A.2d at 810. Although Connecticut's highest court concluded that "the statutory pension scheme establishes a property interest on behalf of all state employees in the existing retirement fund," id. at 416-17, 488 A.2d at 810, it did not address the 1975 legislative action in the due process context.⁵

Assuming that plaintiffs' argument and the dicta of the Connecticut Supreme Court are correct, that property rights inhere in prospective eligibility for state retirement

benefits, the court notes first that the protections embodied in the Due Process Clause have never been held coextensive with prohibitions against state impairments of pre-existing contracts. Pension Benefit Guaranty Corp. v. Gray & Co., 467 U.S. 717, 733, 104 S.Ct. 2709 2719, 81 L.Ed.2d 601 (1984) "PBGC v. Gray"). The applicable test for determining whether a legislative action violates the Due Process Clause is whether the action is justifiable on any conceivable rational basis. It is not the role of the court to question the wisdom or fairness of the legislature's policy judgments. Nor is it the role of the court to substitute its opinion on the merits or desirability of the legislation for that of the legislature which enacted it. It is the role of the court to examine the legislative action merely

to determine whether the action was arbitrary and irrational.

The 1975 legislative action labelled arbitrary by plaintiffs in this case was a response to the Fitzpatrick decision. Fitzpatrick, as noted above, rejected the disparate treatment of male and female employees in the state retirement system. The former system permitted women to retire with five fewer years of service than comparably situated men.

In 1984, the United States Supreme Court held unanimously that an exception to the pension offset provision in the 1977 Amendments to the Social Security Act was constitutional under the equal protection component of the Due Process Clause of the Fifth Amendment. Heckler v. Mathews, 465

U.S. 728, 104 S.Ct. 1387, 79 L.Ed.2d 646 (1984). While acknowledging the "important governmental interest of protecting individuals who planned their retirements in reasonable reliance," id. at 751, 104 S.Ct at 1400, on the provisions previously in effect, the Court noted that "[w]e have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class." Id. at 738, 104 S.Ct. at 1394. The action of Connecticut's legislature was a conscious effort to achieve uniform treatment of men and women and at the same time to achieve fiscal relief. While the 1975 legislation resulted in a higher retirement age for women, matching the age for men in effect prior to Fitzpatrick, "the right to

equal treatment guaranteed by the [Due Process Clause of the Fifth Amendment of the] Constitution is not coextensive with any substantive rights to the benefits denied the party discriminated against." Heckler v. Mathews, 465 U.S. at 739, 104 S.Ct. at 1395.

The Supreme Court has noted the options available to a state in redressing a deficient gender-based statutory scheme and concluded that "[i]n every equal protection attack upon a statute challenged as underinclusive, the State may satisfy the Constitution's commands either by extending benefits to the previously disfavored class or by denying benefits to both parties (e.g., by repealing the statute as a whole)." Orr v. Orr, 440 U.S. 268, 272, 99 S.Ct. 1102, 1108, 59 L.Ed.2d 306 (1979). The State of

Connecticut has effectively repealed the previous discriminatory statute and instituted an amended retirement system, providing equal treatment to male and female employees.

Under the plaintiffs' theory in this case, it would appear that the State could never change the pre-existing retirement provisions, or alternatively, could only change the law in such a fashion as to "grandfather-in" everyone in service prior to the passage of the legislation. In the circumstances presented here, no one eligible to retire under the old system within five years of the passage of the 1975 legislation was adversely affected.* For this court to prohibit the State from amending its retirement plan without effectively giving twenty-five

years' notice would be inappropriately to restrict the power and discretion of the state legislature.

"It is by now well established that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 15, 96 S.Ct. 2882, 2892, 49 L.Ed.2d 752 (1976) ("Usery"), quoted in PBGC v. Gray, 467 U.S. at 729, 104 S.Ct. at 2717; Amtrak, 470 U.S. at 472, 105 S.Ct. at 1455. While the Due Process Clauses of the Fifth and Fourteenth Amendments limit the authority of government entities to terminate a person's property interest

in government benefits, generally courts have sought to avoid interpreting statutory benefit programs as waiving the exercise of sovereign power to amend the statute in the future. Even with respect to termination or modification of a single individual's property rights, if a decision is made "conscientiously and with careful deliberation," Regents of the University of Michigan v. Ewing, 474 U.S. 214, 106 S.Ct. 507, 513, 88 L.Ed.2d 523 (1985), there is no violation of due process. In this case, unless it can be shown that the state legislature, a deliberative body, in contemplating and adopting the 1975 Act acted arbitrarily and irrationally, no violation of due process can be said to exist. Plaintiffs have not met the burden of "establish[ing] that the legislature has acted in an arbitrary

and irrational way." Usery, 428 U.S.
at 15, 96 S.Ct. at 2892.

The legislature evinced a strong concern for the fiscal security of the State Employees Retirement System during a period of financial constraint and at a time when neighboring New York City was facing bankruptcy.⁷ It acted in response to the mandate of Fitpatrick to provide equal treatment of men and women under the system. The new minimum uniform retirement age of fifty-five was the age previously applicable to men in the system. The legislature adopted a transition period enabling employees within five years of the previous minimum age requirement to retire at no loss.

The strong presumption of constitutionality that attaches to

legislative acts, Ferguson v. Skrupa, 372 U.S. 726, 729-31, 83 S.Ct. 1028, 1030-32, 10 L.Ed.2d 93 (1963), and the requirement that a court apply the test of whether the legislature's action is justifiable on any conceivable rational basis, lead inevitably to the conclusion that the 1975 Act did not violate plaintiffs' due process rights.

Conclusion

Absent any questions of material fact that would preclude summary judgment on the record before the court, and for the reasons stated above, plaintiffs' motion for summary judgment is denied and defendants' cross-motion for summary judgment is granted⁸. Judgment for defendants shall enter forthwith.

It is so ordered.

systems.'" England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 415, 84 S.Ct. 461, 465, 11 L.Ed.2d 440 (1964) (quoting Louisiana P. & L. Co. v. Thibodaux, 360 U.S. 25, 29, 79 S.Ct. 1070, 1073, 3 L.Ed.2d 1058 (1959)).

⁵ "Although the plaintiff employees alleged a violation of their due process rights in their complaint, this claim was not discussed in the federal or state trial court decisions, nor was it briefed or argued by the parties on appeal." Pineman III, 195 Conn. at 417, 488 A.2d at 810.

⁶ Plaintiffs, in a one sentence parenthetical comment, suggest that the "grandfathering" provision of the 1975 Act violates the equal protection clause of the Fourteenth Amendment. Plaintiffs' Brief in Support at 35. In the voluminous filings in this case, plaintiffs make only one other reference to this claim. See Supplemental Brief (filed March 11, 1986) at 1. Plaintiffs have provided no basis for their assertion that the legislature's action in permitting state employees within five years of the prior retirement age to retire under the former system is a denial of equal protection under the law. Plaintiffs have not drawn to the court's attention any persuasive, much less controlling, authority for this proposition. Instead, they rely upon a footnote in a dissent which in turn relies upon another dissent. Further, counsel for plaintiffs acknowledged in the hearing on cross-motions for summary judgment that no cases support

their suggestion that the grandfather clause arbitrarily discriminates among employees based on age. Certified Official Transcript of Hearing of March 6, 1986 (filed Feb. 5, 1987) at 22-24. A consideration of plaintiffs' claim persuades the court that it is utterly lacking in merit.

⁷ See, e.g. General Assembly Proceedings 1975: House of Representatives 6346-50.

⁸ Summary judgment is properly granted only if it appears "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P.56(c). In determining whether any issues of material fact are in dispute, the inferences drawn from the record must be viewed in the light most favorable to the non-moving party. Based upon an examination of the full record of the case and the voluminous briefing by the parties, the court concludes that there are no material issues of fact in dispute to render inappropriate the entry of summary judgment for defendants. See generally Anderson v. Liberty Lobby, Inc., - U.S.-, 106 S.Ct. 2505, 2510-12, 91 L.Ed.2d 202 (1986) (discussing the summary judgment standard and stating that "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment").

8758H

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 363—August Term, 1987

(Argued December 11, 1987 Decided March 10, 1988)

Docket No. 87-7558

KAREN PINEMAN, ALPHONSE MAROTTA, DANIEL CLIFFORD, JUDITH NARUS, ROSE SCHEWE and ALFRED K. TYLL,

Appellants,

—v.—

WILLIAM J. FALLON, Chairman of the State Employees Retirement Commission, HENRY E. PARKER, Treasurer of the State of Connecticut, and J. EDWARD CALDWELL, Comptroller of the State of Connecticut,

Appellees.

Before:

LUMBARD, OAKES, and PRATT,

Circuit Judges.

The United States District Court for the District of Connecticut, Jose A. Cabranes, Judge, held that the 1975 revision of the Connecticut State Employees' Retirement Act requiring that women as well as men reach the age of fifty-

five before entitlement to certain retirement benefits did not violate Contract Clause, Taking Clause, or Due Process Clause rights of employees who under prior law would have become entitled to such benefits upon reaching age fifty. *Pineman v. Fallon*, 662 F. Supp. 1311 (D. Conn. 1987).

Affirmed.

PAUL W. ORTH, Hartford, CT, *for Appellants*.

PETER T. ZARELLA, Hartford, CT (Brown, Paindiris & Zarella, Hartford, CT, of counsel), *for Appellees*.

OAKES, *Circuit Judge*:

Between the years of 1939 and 1974 the Connecticut State Employees Retirement Act, 1939 Conn. Pub. Acts 271 ("SERA"), provided that female state employees with twenty-five years of service could retire with full benefits at the age of fifty, while male employees with similar service could receive full benefits only if they retired after reaching age fifty-five. In 1974 then Chief Judge T. Emmet Clarie of the United States District Court for the District of Connecticut held that the retirement plan violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2 to 2000e-5 (1972), and that it was therefore invalid as to male employees. *Fitzpatrick v. Bitzer*, 390 F. Supp. 278 (D. Conn. 1974), *aff'd in part and rev'd in part on other grounds*, 519 F.2d 559 (2d Cir. 1975), *aff'd in part and rev'd in part on other grounds*, 427 U.S. 445

(1976). At the first legislative session following Judge Clarie's decision, the Connecticut General Assembly reacted by passing a law which provided that all qualified state employees could retire with full benefits at fifty-five, in effect increasing by five years the service requirements for females. 1975 Conn. Acts 531 (Reg. Sess.) ("1975 Act"). The 1975 Act also contained a "grandmothering" clause, which provided that qualified female state employees who reached age fifty before June 30, 1980, could retire with full benefits. See Conn. Gen. Stat. § 5-163a (1987).

The serpentine history of this case began in 1977, when certain male and female employees of the State of Connecticut¹ brought a class action challenging the constitutionality of the legislature's adjustment on the theory that the 1975 Act impaired Connecticut's obligations to provide benefits at the retirement ages previously established, in violation of the Contract Clause of the United States Constitution. *Pineman v. Oechslin*, 494 F. Supp. 525 (D. Conn. 1980) ("*Pineman I*"). Judge Cabranes agreed with the plaintiffs, holding that the rights of those who had been state employees on the effective date of the 1975 Act and would not reach age fifty prior to June 30, 1980, had been violated. *Id.* at 553-54. In his careful opinion he attempted to comply with recent Contract Clause cases such as *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), and *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978). He gave "respectful consideration and great weight" to relevant state law, pursuant to *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938), while recognizing that he was not bound by Connecticut's law of

¹ Certain men were included as plaintiffs because for a period of time after the court's order in *Fitzpatrick* but before the effective date of the 1975 Act qualified male employees could receive full retirement benefits at age 50.

contracts. 494 F. Supp. at 538. He rested his opinion on the "leading case" of *Bird v. Connecticut Power Co.*, 144 Conn. 456, 133 A.2d 894 (1957), which held that employee participation in an optional, noncontributory pension plan created contractual rights enforceable against a *private* employer. Relying on *Bird* and its progeny, Judge Cabranes concluded that mandatory participation in Connecticut's pension plan gave rise to contractual rights enforceable against the State. 494 F. Supp. at 538-39 (citing *Wyper v. Providence Washington Ins. Co.*, 533 F.2d 57, 63 (2d Cir. 1976) (construing *Bird* as holding that a pension plan creates contractual rights that cannot be defeated by assertion of discretionary power); *Borden v. Skinner Chuck Co.*, 21 Conn. Supp. 184, 190, 150 A.2d 607, 610 (Super. Ct. 1958)).

This court vacated and remanded *Pineman I* on the ground of abstention, noting that "[n]o Connecticut court ha[d] yet ruled on the precise question whether state employees have vested pension rights prior to becoming eligible to receive benefits." *Pineman v. Oechslin*, 637 F.2d 601, 604 (2d Cir. 1981) ("*Pineman II*"). Following the procedure outlined in *England v. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964), we directed the district court to retain jurisdiction pending a Connecticut court's determination of the state law question. 637 F.2d at 606 n.9.

Plaintiffs accordingly took their claim to state court, reserving their *England* right to return to the district court. See 375 U.S. at 421-22. The Connecticut Supreme Court then held that SERA created no contractual rights that could have been impaired by the 1975 Act. *Pineman v. Oechslin*, 195 Conn. 405, 488 A.2d 803 (1985) ("*Pineman III*"). However, the Connecticut court went on to note, al-

beit in dicta, that the "pension scheme establishes a property interest on behalf of all state employees in the existing retirement fund, which interest is entitled to protection from arbitrary legislative action under the due process provisions of our state and federal constitutions." *Id.* at 416-17, 488 A.2d at 810. Because such a claim had not been discussed by the trial court, or argued on appeal, the court declined to rule on the issue. *Id.*

In 1985 the plaintiffs returned to federal court, and after the resolution of some procedural questions, *Pineman v. Oechslein*, 616 F. Supp. 1227 (D. Conn. 1985) ("*Pineman IV*") (circuit court's vacatur and remand did not render void all pleadings and admissions filed after initial complaint), Judge Cabranes decided *Pineman v. Fallon*, 662 F. Supp. 1311 (D. Conn. 1987) ("*Pineman V*"), dismissing the plaintiffs' action. Because we substantially agree with his thoughtful opinion on both the Contract Clause and Due Process Clause issues, and because we find no merit in the belated argument under the Taking Clause, we affirm.

Contract Clause

While we do not intend to paraphrase the district court's opinion in its entirety, we do want to emphasize its significant points. Judge Cabranes noted, as he did in *Pineman I*, 494 F. Supp. at 538, that he would take guidance, but not be bound, by relevant state court holdings, 662 F. Supp. at 1315, most notably that in *Pineman III*. He then recounted the most recent Supreme Court pronouncement that "absent some clear indication that the legislature intends to bind itself contractually, the presumption is that 'a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.'" *Id.* at 1316

(quoting *National R.R. Passenger Corp. v. Atchison, T. & S.F. Ry.*, 470 U.S. 451, 465-66 (1985) (quoting *Dodge v. Board of Educ.*, 302 U.S. 74, 79 (1937))). The judge then applied this standard to the Connecticut scheme, taking care to refer to the original SERA, as adopted in 1939. He then compared SERA to the Connecticut Municipal Employees Retirement Act, Conn. Gen. Stat. § 2-14a (1987), which contains a specific provision that “[t]he general assembly shall enact no legislation which diminishes or eliminates the rights or benefits granted to any individual under any municipal retirement or pension system.” The district court observed that where the legislature intended to create vested rights in a pension fund it did so expressly, and that SERA contained no such guarantee. 662 F. Supp. at 1316. The court further noted that government workers are less likely to have vested contractual rights prior to the satisfaction of all eligibility requirements than are workers in the private sector. *Id.* (citing *United States v. Larionoff*, 431 U.S. 864, 869 (1977); *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984)).

In affirming the district court, we believe that Judge Cabranes gave appropriate deference to the state court decision in *Pineman III*, which determined that the employees’ interest in the pension fund was neither a gratuity nor a contractual obligation, but rather said it was a property right. 195 Conn. at 416-17, 488 A.2d at 810. See Note, *Public Employee Pensions in Times of Fiscal Distress*, 90 Harv. L. Rev. 992, 1003-05 (1977). This analysis distinguishes pension plans which are contractual in nature by virtue of a state constitutional guarantee, see, e.g., *Winston v. City of New York*, 759 F.2d 242, 248-50 (2d Cir. 1985) (New York City teachers’ retirement system); *Birnbaum v. New York State Teachers Retirement Sys.*, 5 N.Y.2d 1, 8-9, 176 N.Y.S.2d 984, 989-90, 152 N.E.2d 241,

FOOTNOTES

¹ Fitzpatrick v. Bitzer, 390 F.Supp. 278 (D.Conn. 1974), aff'd in part and rev'd in part on grounds not relevant here, 519 F.2d 559 (2d Cir.1975), aff'd in part and rev'd in part on grounds not relevant here, 427 U.S. 445, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976).

² "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . " U.S. Const. art. I, § 10, cl. 1.

³ The analysis in Pineman I took as a starting point the common law of the State of Connecticut. Pineman I, 494 F.Supp. at 538. At the time of the Pineman I decision, "[n]o Connecticut court ha[d] been called upon to consider whether a public employee's expectation of pension benefits, . . . is contractual in nature." Id. at 541.

United States Trust did not address the question of whether a contract had been created since the language of the 1962 covenant at issue in that case made clear that a contractual arrangement had been intended. United States Trust, 431 U.S. at 18, 97 S.Ct. at 1515. Further, in United States Trust, the Supreme Court noted that neither party denied that the covenant constituted a contract. Id. In the case before this court, however, the decision turns on the very determination of whether a contract exists. Unlike the situation presented

in United States Trust, a contract cannot simply be presumed with respect to SERA.

Since Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), it has been a commonplace that federal courts are bound by the declaration of the highest state court on issues of state law. The substantive law to be applied in any case is the law of the state, except in those matters governed by the federal Constitution or Acts of Congress. At the time of this court's 1981 decision, no opinion had yet emerged from the courts of the State of Connecticut as to the contractual status of SERA. See generally Cunningham v. Equitable Life Assurance Society, 652 F.2d 306, 308 (2d Cir. 1981) ("When there is an absence of state authority on an issue presented to a federal court sitting in diversity . . . the federal court must make an estimate of what the state's highest court would rule to be its law."). The Connecticut Supreme Court has now spoken. It is, therefore, the task of this court to consider SERA only from the perspective of the federal Constitution.

⁴ The purpose of abstention is generally to allow state court resolution of purportedly unclear state law in order to avoid a substantial federal constitutional question. "Abstention is a judge-fashioned vehicle for according appropriate deference to the 'respective competence of the state and federal court

258 (1958) (New York State teachers' retirement system), but still provides the employees with some degree of protection.

Due Process Claims

Judge Cabranes also dealt appropriately with appellants' alternative contention that their retirement fund and retirement benefits when treated as property rights should have been protected under the Due Process Clause from arbitrary legislative action. He held that the 1975 Act was neither arbitrary nor irrational. 662 F. Supp. at 1317-19. He carefully noted that Due Process protections are not coextensive with prohibitions against state impairments of preexisting contracts. *Id.* at 1317 (citing *Pension Benefit Guaranty Corp. v. Gray & Co.*, 467 U.S. 717, 733 (1984)). We note parenthetically that the substantive due process standard, at least since the end of the *Lochner* era,² has been whether laws involving economic or property interests are rationally related to a legitimate state interest. See *Williamson v. Lee Optical*, 348 U.S. 483, 487-88 (1955); *Dieffenbach v. Attorney General*, 604 F.2d 187, 195 (2d Cir. 1979); *Image Carrier Corp. v. Beame*, 567 F.2d 1197, 1203 (2d Cir. 1977), *cert. denied*, 440 U.S. 979 (1979). The district court found that the 1975 legislative action was a direct response to the *Fitzpatrick* decision, which had struck down the state retirement system's disparate treatment of male and female employees, and then referred to *Heckler v. Mathews*, 465 U.S. 728 (1984), which had held "that an exception to the pension offset provision in the 1977 Amendments to the Social Security Act was constitutional under the equal protection component of the Due

2 *Lochner v. New York*, 198 U.S. 45 (1905); see L. Tribe, *American Constitutional Law* 450-55 (1978); cf. Sunstein, *Lochner's Legacy*, 87 Colum. L. Rev. 873 (1987).

Process Clause of the Fifth Amendment.” 662 F. Supp. at 1317. As Judge Cabranes pointed out, “[t]he action of Connecticut’s legislature was a conscious effort to achieve uniform treatment of men and women and at the same time to achieve fiscal relief.” *Id.* To hold otherwise, the court noted, would mean that the state would have to give twenty-five years’ notice to amend its retirement plan.³ *Id.* at 1318. Finally, he supported his decision by referring to the strong presumption of constitutionality that attaches to legislative acts in the economic field. *Id.* at 1319 (citing *Ferguson v. Skrupa*, 372 U.S. 726, 729-31 (1963)).

Appellants argue that the prominent features of the 1975 Act were its “suddenness,” its “ ‘getting back’ at the federal court,” its “shock at age fifty retirement,” and “the dire and baseless predictions of New York City style bankruptcy,” all topped off by a desire to “spend[] the money ‘elsewhere.’ ” Such characterizations leave us unimpressed. Obviously, the legislature had to do something in the light of *Fitzpatrick*. Moreover, as the State’s brief points out, the raising of Social Security levels, meaning that the State would have to pay extra Social Security taxes on behalf of its employees, produced the reciprocal effect of reducing employee contributions under the Connecticut retirement system. This happened because employee contributions into the state system are at the rate of 2% of compensation up to the Social Security taxable wage base, and 5% of amounts in excess of that wage base. We note that State contributions to SERA rose rapidly during the 1970s: in 1971 the State contributed approximately \$18.5 million to SERA, and an additional \$14 million to Social Security, while in 1974 the contribution to SERA was ap-

3 As it was, the 1975 Act allowed employees eligible to retire under the old system before 1980 to receive the pre-1975 level of benefits.

proximately \$43.5 million and to Social Security about \$20 million.

Moreover, the Connecticut legislature undoubtedly knew that high levels of inflation, combined with the use of the highest years of pay to calculate retirement benefits, Conn. Gen. Stat. § 5-162(b) (1987), would place extreme pressure on the system. At a time of escalating wages the legislature could well have taken into account that for many years employee contributions had been made at lower pay levels, that benefits would have to be paid based on higher pay levels, and that the Connecticut plan was not well funded, so that investment return was not likely to be substantial. Connecticut's system was one of the most poorly funded in the country, and one of the most expensive as measured by percentage of payroll. Judge Cabranes referred, 662 F. Supp. at 1318 n.7, to legislative proceedings in which a state representative criticized the pension plan as "far more liberal than is provided in any public employer" and as likely, unless modified, to bankrupt Connecticut. General Assembly Proceedings 1975: House of Representatives 6346 (June 3, 1975). The legislature clearly was well aware of what it was doing and acted within the boundaries of due process.

Taking Clause

Finally, appellants make a belated Taking Clause argument, relying principally on *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986). *Connolly* reiterated that Taking Clause cases require "ad hoc, factual inquiries into the circumstances of each particular case," and that three factors "have 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct

investment-backed expectations'; and (3) 'the character of the governmental action.' " 475 U.S. at 224-25 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). But while this method of analysis may be helpful to the plaintiffs, the result in *Connolly*—that the withdrawal of liability provisions of the Multiemployer Pension Plan Amendment Act of 1980 did not constitute a compensable taking—is not. 475 U.S. at 227-28. See also *Bowen v. Gilliard*, 107 S. Ct. 3008, 3020 (1987) (amendment to Aid to Families with Dependent Children Act by Deficit Reduction Act of 1984 not violative of Taking Clause). While we do not mean to suggest, as Justice Holmes once did in respect to the Equal Protection Clause, that the Taking Clause has become the "last resort of constitutional arguments," *Buck v. Bell*, 274 U.S. 200, 208 (1927), we think it adds little to the Contract Clause and Due Process analysis already undertaken. Focusing on the *Connolly/Penn Central* factors, the governmental action undertaken in the 1975 Act was not unreasonable. Connecticut did not physically invade or permanently appropriate any of the employees' assets for its own use; instead, by grandmothering in those whose pension rights would vest within five years of the date of the bill but not those whose rights would vest subsequently, the legislature merely made an adjustment of the benefits and burdens of economic life, not a taking requiring government compensation. See *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976) ("legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations"). Nor does the Act have any severe economic impact. All that it required is that women (and men) work until age fifty-five to receive full pension benefits, which is what male employees were required to do before *Fitzpatrick v. Bitzer* struck down the prior scheme. While they

may have to make additional contributions to the plan, any hardships is balanced by increased benefits. Finally, since there were no contractual rights, the Act did not interfere with reasonable investment-backed expectations. Employees were surely aware that pension benefits were subject to legislative adjustment, though of course hoping that benefits would increase and the retirement age be reduced. But such hopes cannot be transformed into "reasonable expectations" simply by the wave of a legal wand. *Cf. Metropolitan Transp. Auth. v. ICC*, 792 F.2d 287, 296-97 (2d Cir.) (no such expectations arose from public authority's lease of trackage), *cert. denied*, 107 S. Ct. 669 (1986).

Judgment affirmed.

United States Court of Appeals

FOR THE
SECOND CIRCUIT

COMM.
17 NOV 1987
CARRANES

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the TENTH day of MARCH, one thousand nine hundred and Eighty-eight.

Present: HONORABLE J. EDWARD LUMBARD,
HONORABLE JAMES L. OAKES,
HONORABLE GEORGE C. PRATT.

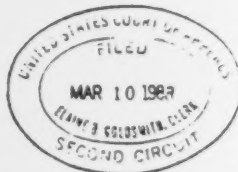
Circuit Judges,

KAREN PINEMAN, ALPHONSE MAROTTA, DANIEL CLIFFORD, JUDITH NARUS, ROSE SCHEWE and ALFRED K. TYLL.

Appellants.

WILLIAM J. FALLON, Chairman of the State Employees Retirement Commission, HENRY E. PARKER, Treasurer of the State of Connecticut, and J. EDWARD CALDWELL, Comptroller of the State of Connecticut.

Appellees.



87-7558

Appeal from the United States District Court for the District of Connecticut.

This cause came on to be heard on the transcript of record from the United States District Court for the District of Connecticut, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the Judgment of said District Court be and it hereby is Affirmed in accordance with the opinion of this Court with Costs to be taxed against the appellants.

SHIPMAN & GORDON
NEW YORK

A TRUE COPY
ELAINE B. GOLDSMITH

ELAINE B. GOLDSMITH, Clerk
by:

Edward J. Guardaro,
Deputy Clerk

JUN 30 1988

JOSEPH F. SPANIOLO, JR.,
CLERK

(3)
No. 87-2019

**In The
Supreme Court Of The United States**

OCTOBER TERM, 1988

**KAREN PINEMAN, ALPHONSE MAROTTA,
DANIEL CLIFFORD, JUDITH NARUS,
ROSE SCHEWE and ALFRED K. TYLL,**
Petitioners,

v.

**WILLIAM J. FALLON, Chairman of the
State Employees Retirement Commission,
HENRY E. PARKER, Treasurer of the
State of Connecticut, and
J. EDWARD CALDWELL, Comptroller of the
State of Connecticut,**
Respondents.

**RESPONDENTS' BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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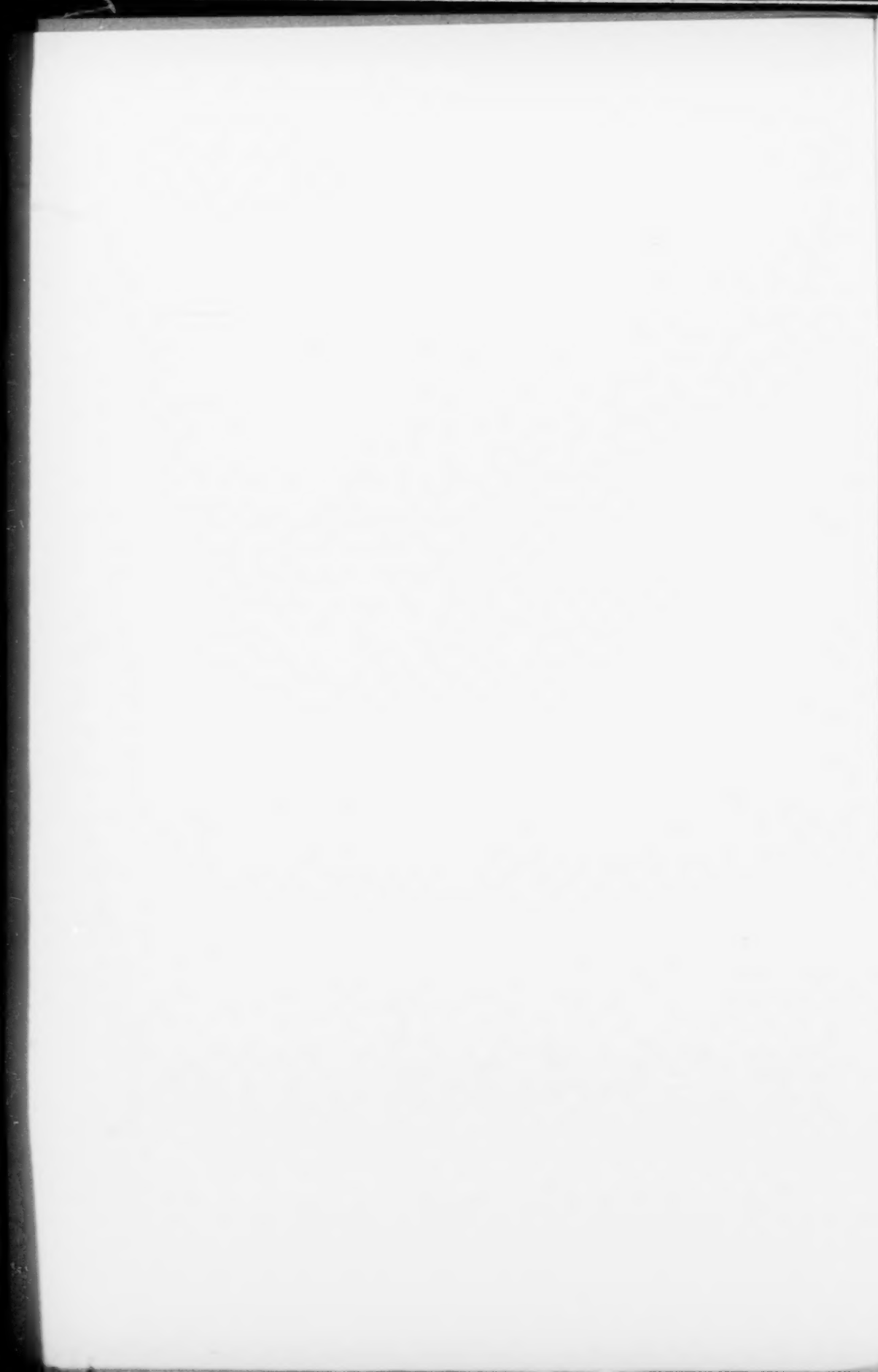
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<i>Orr v. Orr</i> , 440 U.S. 268 (1979)	5
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TABLE OF AUTHORITIES (continued)

Cases:	Page(s)
<i>Pineman v. Oechslin</i> , 195 Conn. 405, 488 A.2d 803 (1985)	3, 4
<i>United States v. Larionoff</i> , 431 U.S. 864 (1977)	3, 4
<i>Urserly v. Turner Elkhorn Mining Co.</i> , 428 U.S. 1, 15 (1976)	5
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STATEMENT OF THE CASE

[The respondents respectfully direct the Court's attention to the facts of this case as set forth by the district court throughout its opinion in *Pineman v. Fallon*, 662 F. Supp. 1311 (D. Conn. 1987) ("*Pineman V*") and as set forth in the respondents' uncontroverted Contentions of Fact from *Pineman V*, which contentions have been lodged with the Court and are referenced in Footnote 1 herein.]

[References to "Petition" are to petitioners' instant Petition for a Writ of Certiorari.]

SUMMARY OF ARGUMENT

There is no important reason for granting this petition as the constitutional issues herein have been decided by this Court, and the specific issues involved merely derive from the particular facts of this case.¹ In addition, the lower court's finding that the 1975 revision of the Connecticut State Employees' Retirement Act did not violate the Contract Clause, Taking Clause or Due Process Clause is sound and in accord with all applicable decisions of this Court. Finally, the petitioner takes issue not with the statement of the law as enunciated by the district court and court of appeals but rather with the application of that law to the facts of this case.

¹ The respondents have lodged with the Court their Contentions of Fact filed with the district court in *Pineman V*, which contentions are uncontroverted and with respect to which no counter-contentions were filed by petitioners.

ARGUMENT

THERE IS NO IMPORTANT REASON FOR GRANTING THIS PETITION AS THE CONSTITUTIONAL ISSUES HEREIN HAVE BEEN DECIDED PREVIOUSLY BY THIS COURT, AND THE PETITIONER IS MERELY DISAGREEING WITH THE APPLICATION OF THE RELEVANT CASE LAW TO THE FACTS OF THIS CASE.

A. The Holding Of The Lower Courts Comports With The Applicable Decisions Of The United States Supreme Court.

The respondents respectfully submit that the decisions of the Connecticut Supreme Court, the United States District Court, and the Court of Appeals for the Second Circuit in this case are not in conflict with the applicable decisions of this Court. As early as 1937 this Court held that a statute fixing salaries is presumed not to intend the creation of private contractual or vested rights but merely to declare a policy to be pursued until the legislature decides otherwise. *Dodge v. Board of Education*, 302 U.S. 74, 78-79 (1937); see also *Flemming v. Nestor*, 363 U.S. 603 (1960). Relying on the oft-cited case of *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95 (1938), the petitioners suggest that this Court's rejection of the Indiana Supreme Court's opinion somehow bolsters their claim that contractual obligations were created by the Connecticut legislature (Petition, p. 8). In *Indiana ex rel.* the Court noted that the Indiana legislature used the word "contract" 25 times in the subject legislation, thereby indicating a clear intent to bind itself contractually, *Id.* at 105, unlike the Connecticut statute which no court has found to indicate any intent to contract. Cf. Connecticut General Statutes Section 2-14a. (See respondents' Appendix.) Likewise, in *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978), the petitioners seek to find support for their assertion that the 1975 Act was a "major, unforeseen and retroactive" change in pension funding.

"without moderation or reason, in the spirit of oppression." (Petition, pp. 8-9.) *Allied* involved a private, contractual pension plan which the Court found to have been "grossly distorted" by a law "not even purportedly enacted to deal with a broad, generalized economic or social problem." *Allied*, 438 U.S. at 250. In *United States v. Larionoff*, 431 U.S. 864 (1977), the court held that the entitlement of government workers to pay and benefits "must be determined by reference to the statutes and regulations governing compensation . . . rather than to ordinary contract principles." *Pineman V*, 662 F. Supp. 1311, 1316 (D. Conn. 1987), quoting *Larionoff*, 431 U.S. at 869. See also *American Postal Workers Union, AFL-CIO v. U.S. Postal Service*, 707 F.2d 548 (D.C. Cir. 1983). In *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), a case the petitioners suggest was not applied by the district court to invalidate the 1975 Act, the Second Circuit noted that while the method of analysis in that case may have been helpful to the petitioners, the result — that no compensable taking occurred — was not. *Pineman v. Fallon*, 842 F.2d 598, 602 (2d Cir. 1988), ("Pineman VI"). Last, despite petitioners' claim to the contrary (Petition, p. 7), the Connecticut Supreme Court in *Pineman v. Oechslein*, 195 Conn. 405, 588 A.2d 803 (1985) ("Pineman III") did not hold that a state could never be found to have created an implied contract, but rather that a state legislature must evidence an intent to contract in order for a statute to take on contractual dimensions. *Pineman III* at 416.

B. The Petitioner Does Not Suggest That The Statement Of The Law By The Lower Courts Is Incorrect But Rather That The Courts Somehow Misapplied That Law To The Particular Facts In This Case.

With respect to the Contract Clause, the petitioners apparently do not disagree with the federal courts' statement of the law but rather disagree with its application. At pages 7 and 9 of their petition, the petitioners allege that the lower courts gave "undue" deference to the Connecticut Supreme Court's ruling in *Pineman III*. The district court noted that

while giving great significance to the holding of the Connecticut Supreme Court in *Pineman III*, the federal court "must make an independent determination whether the retirement arrangement at issue in this case is indeed a 'contract' for the Contract Clause purpose," *Pineman V*, 662 F. Supp. at 1315. It was the petitioners themselves who pointed to language in handbooks provided to their class which describes procedures for those employed by the state for less than ten years. As the district court found, rather than supporting petitioners' claim that a contract exists, the language bolsters respondents' claim that the intent of the State is to confer benefits only upon the full completion of all terms of eligibility, i.e., when rights to benefits vest. *Id.* at 1316. Viewed against the backdrop of this Court's ruling in *Larionoff*, and of the District of Columbia Circuit's opinion in *Kizas v. Webster*, 707 F.2d 524, 535 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984), the voluminous factual foreground in this case led the court to the conclusion enunciated in *National Railroad Passenger Corporation v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451 (1985) ("Amtrak"), that "[p]olicies, unlike contracts, are inherently subject to revision and repeal, and to construe laws as contracts when the obligation is not clearly and unequivocally expressed would be to limit drastically the essential powers of a legislative body." *Id.*, 470 U.S. at 466.

With respect to their Taking Clause claim, the petitioners relied on and continue to refer to *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 224-25 (1986). The Court in *Connolly* restated the requirement that Taking Clause cases require "[a]d hoc, factual inquiries into the circumstances of each particular case," and that particular significance must be accorded to the following factors: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action. *Id.*, 475 U.S. at 224-25. Here, again, the facts adduced by the district court do not substantiate the petitioners' claim, but, in fact, run afoul of the petitioners' suggested reliance on *Connolly*. As the Second Circuit recently noted, the State of Con-

necticut did not physically invade or permanently appropriate any of the employees' assets for its own use, nor did the Act have a severe economic impact as any additional contributions to the plan are balanced by increased benefits. The petitioners' assertion on page 10 of their Petition that petitioner Pineman must work and contribute for five additional years to receive benefits, or lose everything, is wholly untrue. If Ms. Pineman retired at age 50, she would begin receiving benefits (based on her years of service) upon turning 55 and if she elected to work five (5) years longer would receive dramatically higher benefits. (See respondents' Contentions of Fact Nos. 48 and 49 referenced in Footnote 1.)

Finally, as to petitioners' Due Process Clause claims, it is suggested that state employees have a property interest in the retirement fund and retirement benefits which are protected under the Due Process Clause from arbitrary legislative action. The substantive due process test is whether the action is rationally related to a legitimate state interest. *Pine-man VI* at 601 (citations omitted). In the instant case, the 1975 legislative action in question was an obvious response to the *Fitzpatrick v. Bitzer*, 390 F. Supp. 278 (D. Conn. 1974) *aff'd in part and rev'd in part on other grounds*, 519 F.2d 559 (2nd Cir. 1975) *aff'd in part and rev'd in part on other grounds*, 427 U.S. 445 (1976) decision which condemned the disparate treatment of men and women in the state retirement system. The legislature's decision to raise the age of retirement for female employees is in conformity with *Heckler v. Mathews*, 465 U.S. 728 (1984) and *Orr v. Orr*, 440 U.S. 268 (1979), and as an economic adjustment comes to the Court with a presumption of constitutionality. *Ursery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Moreover, the raising of Social Security levels and the concomitant increase in the State's burden of funding these taxes on behalf of its employees produced a reciprocal effect of reducing employee contributions. Connecticut's retirement system was one of the most poorly funded in the country and one of the most expensive based on percentage of payroll. Though petitioners continue to maintain that the 1975 Act constituted the "nadir of

irrationality," they offered no evidence to contradict the economic data presented by the respondents and utilized by the Connecticut legislature. (See respondents' Contentions of Fact referenced in Footnote 1.)

CONCLUSION

For all the foregoing reasons, the respondents respectfully request that the Court deny the Petition seeking a Writ of Certiorari.

Respectfully submitted,

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No. 87-2019

**In The
Supreme Court Of The United States**

OCTOBER TERM, 1988

**KAREN PINEMAN, ALPHONSE MAROTTA,
DANIEL CLIFFORD, JUDITH NARUS,
ROSE SCHEWE and ALFRED K. TYLL,**
Petitioners,

v.

**WILLIAM J. FALLON, Chairman of the
State Employees Retirement Commission,
HENRY E. PARKER, Treasurer of the
State of Connecticut, and
J. EDWARD CALDWELL, Comptroller of the
State of Connecticut,**
Respondents.

APPENDIX



§ 2-14a. Legislation affecting municipal retirement systems

The general assembly shall enact no legislation which diminishes or eliminates the rights or benefits granted to any individual under any municipal retirement or pension system. Nothing contained herein shall prevent any municipality, covered under the Connecticut Municipal Employees Retirement Act, from becoming a member of the Old Age and Survivors Insurance System under Title 2 of the Social Security Act.

(1963, P.A. 619.)